Chapter 9: EFFECT OF RECORDING INSTRUMENTS NOT IN THE CHAIN OF TITLE
(By University of Southern California)

I. INTRODUCTION

It is generally understood that an innocent purchaser is not put on notice from the record of instruments which are not in the chain of title. Just what instruments are in the chain of title is not always clear and the California courts have struggled with this problem. The purpose of this section is to determine the reason for such a rule and to clarify what instruments are in a purchaser's chain of title and what instruments although closely connected with the interest of the vendee are not in the chain of title for various reasons. There is a natural division into the following classifications:

A. Instruments executed by a stranger to the title.

B. Instruments recorded before grantor obtained title.

C. Instruments executed and recorded after grantor had apparently parted with title.

D. Instruments executed before but recorded after execution of other conveyances by same grantor.

E. Conveyances of neighboring land by the same grantor containing restrictions on land retained by the grantor and later conveyed.

II. INSTRUMENTS EXECUTED BY A STRANGER TO THE TITLE

The purpose of the recording act is to charge a purchaser with constructive notice of that which he would have discovered by a diligent search of the records. The system used in California is the grantor-grantee system and not the tract or plat system. The only way a purchaser can find instruments affecting his title is by searching the name of his proposed grantor on the grantee index to find all instruments in which the proposed grantor was a grantee. He must then read the record of each of these instruments to find the one by which the proposed grantor obtained title to this piece of property. It is necessary to read each of these since the index does not give the legal description of the property. It only gives the grantor's name and the grantee's name and a book and page reference where the particular document is recorded. See Chapters 1 and 4 for a discussion of the method of search. When the instrument is found by which the proposed grantor acquired title, the next step is to trace the name of the grantor in that instrument to find the instrument by which he acquired title. This is done in the same manner as described above. The purchaser continues this procedure until the original source of title is discovered.

The purchaser then traces each grantor on the grantor index to find

any instruments of conveyance executed by him. He then reads each of these instruments to find whether they involved the property he is purchasing.

The original source of title is generally a government patent, since all titles were judicially determined and patents issued when California became a state. This was required by the 1850 Statute of Congress which established the United States Board of Land Commissioners which was given authority to determine these titles. Appeals were allowed to the United States District Court and then to the United States Supreme Court. The adjudication of the Commission has repeatedly been held to be conclusive as to the validity of the original grants by the Spanish and Mexican governments.

From an analysis of this system of searching records, it can be seen that a purchaser will not be likely to run across instruments which although properly recorded were not in the chain of conveyances through which he deraigned title to the property. For this reason, the rule is established that a purchaser will not be put on constructive notice of instruments which although properly recorded would not be discovered by this search. That is, he would not be charged with notice from the record of instruments executed by persons not in his chain of title. This is true even though such persons had actually acquired interests in the property by unrecorded conveyances or other instruments.

This subject really involves the question of what interests a subsequent purchaser will be subject to. He will not be subject to interests acquired through an instrument executed by a stranger to the record title.

For example: O, owner of Blackacre conveys to A, who properly records the deed from O. Subsequently, O attempts to convey the same piece of property to B, who records the deed from O. B will not be protected in such a situation. A is given protection on the basis of either of two theories:

(1) The proper theory is that A was first in time and by recording preserved his common law priority.

(2) The theory applied by most courts is that B was given constructive notice by the record of the conveyance to A and therefore, B cannot claim as a bona fide purchaser without notice of that conveyance.

If, however, there is a conveyance made by a stranger to the title there will be no protection to his grantee. For example: X, who claims title to Blackacre by an unrecorded instrument purports to convey Blackacre to A, who properly records his instrument. Subsequently, O, record owner of Blackacre, conveys to B, who properly records his instrument. A will not be protected against B even though he records his instrument first. It is necessary for him to claim through the record owner in order to be

protected. This means that even though A recorded first, he will not have priority over subsequent parties who record later nor against prior unrecorded conveyances from the record owner. The courts usually treat the problem as one of constructive notice when subsequent parties are involved. The courts hold that B would not take subject to any interests which he could not find out about from the record. He is not charged with constructive notice of this conveyance to A by X.

There is, however, an exception made in the case of adverse possession. If the grantor, X in this case, claimed title by adverse possession he could convey to A who could then claim that B takes with notice of the title acquired by adverse possession even though there is no record of X's claim in the Recorder's office. It has been held that constructive notice results from possession alone. This subject is quite complex and is discussed in Chapter 2 of Part IV.

The California statute, Civil Code Section 1213, which provides for the doctrine of constructive notice from the record does not by its terms confine the doctrine of notice to instruments in the chain of title. It states:

> "Every conveyance of real property acknowledged or proved and certified and recorded as prescribed by law from the time it is filed with the recorder for record is constructive notice of the contents thereof to subsequent purchasers and mortgagees;..."

It has been left to the courts to read in the limitations as to the chain of title.

In the case of Bothin v California T. I. & Trust Co.(1) the court in discussing Civil Code Section 1213 stated:

> "This language is very general, applying in terms to every conveyance (italics), but it is held that this only contemplates conveyances by one having legal title to the property conveyed and is applied where there are conflicting conveyances made by persons claiming under the same grantor. It does not apply to a deed by a stranger; one who is not connected in any manner with the title of record. No notice whatever is conveyed by such a deed."

The court relies on two earlier California cases which had previously enunciated this rule, Long v Dollarhide(2) and Garber v Gianella.(3)

If the subsequent purchaser has actual notice of the existence of an instrument even if it is outside the record chain of title, he will take subject thereto. This policy is to avoid the perpetration of frauds by purchasers with actual notice of unrecorded conveyances and conveyances not in the record chain of title.

The California courts have also held that a subsequent purchaser may

be charged with notice of an instrument which has been recorded, although not in the chain of title, if the purchaser has notice or knowledge of facts and circumstances which would lead a reasonable man to investigate and discover the existence of such a document.(4)

If a person who has no title either of record or not of record attempts to convey property to another and the grantee records he is given no protection by recording. There would be no question of notice to subsequent purchasers in that case. The problem would be settled by holding that recording does not give any validity to an invalid instrument. No protection is given to a party who claims title through an invalid instrument.

A typical instance of a break in the chain of title occurs when property is conveyed by a person in a different name than that by which he acquired title.(5) What notice a person derives from the records in such a case is determined at the present time by a specific statutory provision, but there is an interesting history behind this statute.

In the early case of Fallon v Kehoe(6) a conveyance was made to "Darby Fallon" which was a nickname for Jeremiah Fallon the true name of the grantee. Before the 1850 recording act was passed, Jeremiah conveyed the property to plaintiff by a deed with his true name, Jeremiah Fallon. After the passage of the act, this deed was recorded. Jeremiah then attempted to convey to another party using his nickname, Darby Fallon, in the deed. Defendant, a bona fide purchaser without notice, claimed title through the grantee of this later deed, as a result of several mesne conveyances.

The court held that title passed to plaintiff, grantee #1 even though the name of the grantor was different from that which appeared in the deed by which he had acquired title. This is in accord with the common law rule that a conveyance by the true owner passes title regardless of the name used by him in the deed. This deed was of course, not in the chain of title.

The main question involved was whether the record of this deed would constitute constructive notice to subsequent purchasers claiming title through the second deed which was signed by the correct name, Jeremiah.

The court construed the 1850 statute providing for constructive notice and concluded that there would be no exception made in a situation like this. The first grantee had complied with the Recording Act and properly recorded the document and, therefore, the constructive notice the statute provided for would follow. The court refused to read in the limitation that the instrument must be in the chain of title or no notice will be imparted. The court stated:

> "It would have been better, perhaps, if the statute had contained a provision to the effect that when the owner of land conveys it by a different name from that in which he acquired it, the deed should contain a proper reference to that fact, for the security of subsequent purchasers or encumbrancers. But there is no such requirement in the statute, or at common

law, and we have no power to exact conditions not found in the law."

The legislature in 1905 took the suggestion of the court in Fallon v Kehoe and enacted Civil Code Section 1096(7) which read as follows before a 1947 enactment which amended it:

"Any person in whom the title of real estate is vested, who shall afterwards, from any cause, have his or her name changed, must, in any conveyance of said real estate so held, set forth the name in which he or she derived title to said real estate."

In 1942 in the case of Puccetti v Girola,(8) the California Supreme Court declared that this code section meant that any conveyance which did not comply with this requirement would not give constructive notice to third parties when recorded and furthermore, would be invalid between the parties. The legislature apparently considering this too harsh a result amended Civil Code Section 1096 in 1947(9) by adding the following provision:

"Any conveyance, though recorded as provided by law, which does not comply with the foregoing provision shall not impart constructive notice of the contents thereof to subsequent purchasers and encumbrancers, but such conveyance is valid as between the parties thereto and those who have notice thereof."

This amendment puts the purchaser in the same position as he would be in if any other formal prerequisites to recordation had not been complied with, but does not affect the validity of the instrument between the parties.

Section 27334 of the Government Code provides for the manner of recording these conveyances. It states:

"If the name of the person in whom title to real estate is vested is changed from any cause, the recorder shall alphabetically index the conveyance in the "Index of Grantors," both in the name by which title was acquired and the name by which it is conveyed."

III. INSTRUMENTS RECORDED BEFORE GRANTOR OBTAINED TITLE

When a person purports to convey property to another before he has acquired title to the property himself, but then later acquires title, the courts generally hold that between these two parties the grantee has a valid title. This result is based on the doctrine of "Estoppel by Deed." There are two explanations of this phenomenon which are given by various courts in the United States. The first theory is that the grantor has purported to convey a title and is later estopped from asserting the title he subsequently acquires. The other theory is that the title actually passes directly to the grantee under the conveyance to the grantor.(10)

The application of the rule of "Estoppel by Deed" is limited, generally, to a situation in which the grantor is attempting to transfer a definite interest in land, and does not apply when he merely quit claims such interest as he may have.

The California legislature has codified the doctrine of "Estoppel by Deed" in Civil Code Section 1106:

> "Where a person purports by proper instrument to grant real property in fee simple, and subsequently acquires any title, or claim of title thereto, the same passes by operation of law to the grantee, or his successors."

The doctrine in California applies likewise to a mortgagor who acquires title subsequent to the execution of a mortgage.

A more difficult problem arises when the rights of third parties intervene. For example, A purports to convey Blackacre to B before he acquires title and subsequent to the acquisition of title conveys to C, a bona fide purchaser without notice of the former conveyance. There is a conflict of authority in the cases in the various states as to which of these two grantees would have priority. Leaving out any effect the recording acts might have, some courts have held that the estoppel will be raised against any parties to whom the grantor later attempts to convey regardless of whether they have notice or not. In other states, a contrary view is expressed, which protects the purchaser in such a situation, provided he is without notice.

The recording acts have complicated the entire situation further. For example, A conveys to B, before acquiring title. B records the deed immediately. A, after acquiring title, conveys to C, a bona fide purchaser, who records his deed. If the recording statute states that the record of a conveyance shall constitute constructive notice to subsequent purchasers for value, without notice, will C be treated as having notice of the conveyance to B and, therefore, take subject thereto? Courts in some states have mechanically applied the recording statute to this situation and protected the party who first recorded.

Other courts have followed a more practical and sensible approach by holding that the first conveyance is not in the chain of title of the second grantee and, therefore, he is not put on notice of its terms. The California courts follow this view and do not put a purchaser on notice of conveyances made by his grantor or a grantor in his chain of title before acquisition of title to property. The basis for this conclusion is that a purchaser should be put on notice only of those instruments which he would discover by an orcinary search of the records. A person in searching the records would not be likely to find conveyances made by his grantor before acquisition of title. He would search back to the source of his grantor's title, but would not in so doing find conveyances by the grantor made before he acquired title. To find these a special search would be required and the California courts have felt this additional search would

be too great a burden. It would require a purchaser to investigate conveyances by all grantors in the chain of title to find any possible conveyances made by any of them before they had acquired title. Since such a search is not contemplated and such documents will not generally be discovered, a purchaser in California will not be considered to have constructive notice from the record of conveyances made or encumbrances created by a grantor and recorded before the date on which the grantor acquired title himself. Of course, if the purchaser has actual notice, he will take title subject to such conveyance or encumbrance.

The case of Ludy v Zumwalt,(11) a leading California case on after-acquired title affords a clear illustration of this problem. Defendant acquired an option to purchase a certain area of land, but had not acquired title to the property. He made a contract with a water company to have water furnished to the area for irrigation and in the contract a permanent lien on the land was given to the company as security for the payments due under the terms of the contract. At the time of execution and recordation of this contract, the defendant did not have any interest in the land. The court holds that an option merely gave him a contract right, not an interest in real property. Subsequently, the defendant purchased the land from plaintiff giving a note and purchase money mortgage in return. The mortgage was properly recorded. Payments on the contract were not made nor payments on the purchase price. The mortgagee sued to foreclose the mortgage and the water company cross-complained to foreclose its lien which it claimed had priority over the mortgage since it was first recorded.

The court reviewed the authorities both in California and in other states and concluded that the mortgagee would not be put on notice of the contract made by the optionee nor of the lien given to secure payment of the contract. The reasoning of the court indicates that this instrument would be outside the record chain of title and could not be found by an ordinary search of the records. Therefore, to impute constructive notice of such an instrument would be unfair to the subsequent lien claimant. The opinion states:

> "The plaintiff in the present case would manifestly have no reason to investigate the public records to ascertain whether I. G. Zumwalt or any other stranger to the title had created, or any person had acquired, a lien upon the property prior to the execution of the deed by plaintiff to the Zumwalts conveying the lands to them and the simultaneous execution of the mortgage by the latter to secure the purchase price thereof, or at least so much of such purchase price as plaintiff was entitled to. And even if she had for any reason examined the records for that purpose, she would not, under any indexing system of recording written instruments required by law to be recorded, have obtained any knowledge of the lien of appellant, unless she had gone further in her investigation of the records than the law contemplates."

It was argued by counsel in this case that when title was acquired

it related back to the time the option was given and cut off any intervening rights. The court, however, refused to apply the rule of relation back. This rule is only applied to further justice and in this case it would work manifest injustice. The most important reason, however, why the court refused such relation back is that an option does not convey any interest in land. Therefore, there is nothing to relate back to. If it had been a contract to purchase, an equitable interest would have been created in the purchaser and title would relate back to the time of the making of the contract if it were desirable in the particular situation. This result, however, could be possible only if an interest in land were involved. It could not be achieved in the case of an option agreement, the court stated.

The case of Sun Lumber Co. v Bradfield(12) provides another example of the California view when different types of encumbrances are involved, e.g. a materialman's lien and a deed of trust. A deed of trust was given by a person at a time when he had not yet received delivery of the deed covering the property and therefore, was not the owner of the property. Subsequently, he received delivery of this deed transferring title to him. At that moment according to the principle of Estoppel by Deed, the trustee acquired title to the property. The trust deed had been recorded when given, which was before there was any title in the trustor to be transferred to the trustee under such trust deed. Prior to delivery of the deed to the trustor which was likewise prior to the acquisition of title by the trustee under the trust deed, materialmen had furnished materials for a building on this property. A conflict arose between the purchaser at the foreclosure sale of the trust deed and the materialman's lien claimant as to which had priority.

The court based its decision on Section 1186 of the Code of Civil Procedure which reads as follows:

> "The liens provided for in this chapter are preferred to any lien, mortgage, deed of trust, or other encumbrance, upon the premises and improvements to which the liens provided for in this chapter attach, which may have attached subsequent to the time when the building, improvement, structure, or work of improvement in connection with which the lien claimant has done his work or furnished his material, was commenced; also to any lien, mortgage, deed of trust, or other encumbrance of which the lienholder had no notice, and which was unrecorded at the time the building, improvement, structure or work of improvement with which the lien claimant has done his work or furnished his material was commenced."

The lien of the trust deed attached when the deed conveying the property was delivered to the trustor since at that time by the principle of Estoppel by Deed, the trustee received title to the property under the trust deed. This was after the materialman's lien had attached by delivery of the materials. The result was, therefore, that although the trust deed was executed and recorded prior to the time when the lien of the materialman

had actually attached to the land, it did not actually attach until after the other lien had attached. According to the code section quoted above, the lien of the trust deed would be subordinate to the lien of the materialman since it had attached subsequent to the time when the material had been furnished by the materialman, and subsequent to the commencement of work on the building. Since the lien claimant had priority he was protected in the foreclosure sale against the purchaser.

IV. INSTRUMENTS EXECUTED AND RECORDED AFTER GRANTOR APPARENTLY PARTED WITH TITLE

It is the California view as seen in the above section that a subsequent purchaser without actual notice will not be treated as having constructive notice of instruments executed and recorded before a grantor acquired title to the property. This same view is expressed by the California court in regard to an instrument executed and recorded after the grantor parted with title.

For example, A conveys to B, and later conveys to C by a recorded deed. If B then conveys to X, a bona fide purchaser without notice of the conveyance to C, X will not be treated as having constructive notice of the later deed to C, since it was made after A had apparently parted with title.

The practical consequences of this doctrine are illustrated in the case of Rowley v Davis.(13) A conveyance was made by the owner by an absolute deed, but the intent of the parties was that it should operate as a mortgage only. The deed was properly recorded, but did not show the fact it was given for security only. Subsequently, a document was filed by the grantor stating that the original conveyance was merely for the purpose of security. The purpose of this was to indicate to subsequent purchasers that the conveyance was in fact a mortgage. The property was then conveyed to the plaintiff by the mortgagee, the plaintiff not having notice of the instrument subsequently filed by the original grantor limiting the effect of her conveyance. Plaintiff brought this action to quiet title against the party claiming as a mortgagor since he claimed to have no notice of the fact that the deed was really a mortgage and no notice of the document limiting the effect of the original conveyance. The court held that since the record showed that the grantor had completely parted with title by the original deed, a subsequent instrument attempting to limit the effect of her conveyance would be ineffective. Such an instrument filed subsequently would not put a subsequent purchaser on notice of the fact that the parties had intended the deed to operate as a mortgage. This effect could only be achieved by a recorded contract signed by the original grantee at the same time he executed the deed and which stated the conveyance was for security only and that the property would be reconveyed when the debt was paid off.

V. INSTRUMENTS EXECUTED BEFORE BUT RECORDED AFTER EXECUTION OF OTHER CONVEYANCES BY SAME GRANTOR

This problem can be illustrated as follows: A conveys to B by deed executed January 1, 1950. A then conveys to C by deed executed February 1,

1950. C records his deed on February 3, but B does not record until February 5. The rule which California follows is that the first purchaser for value, without notice, and in good faith to record will prevail as between B and C. This means that if C has no actual notice and no notice from facts and circumstances putting him on inquiry, on the day he purchases, and if he properly records his instrument before B, C will have priority over B. The basis for this is that under Civil Code Section 1214 a purchaser is only put on notice of instruments recorded before he records. It does not apply to instruments executed before but recorded after he records.

A more difficult problem arises when the first recorded grantee conveys the property to a third party. A conveys to B who fails to record until after A has conveyed to C who records immediately. C then conveys to X after both of the other conveyances have been recorded and X claims priority over B. The court faced with a situation like this in the case of Manoney v Middleton,(14) held that X had constructive notice of the conveyances from A to B and C at the time he purchased, since both are in his chain of title and would be discovered by a proper search of the grantor-grantee books. This forces a purchaser to search for instruments recorded after the instrument by which his grantor acquired title, involving deeds executed before the deed by which his grantor obtained title but which were recorded after that time. He must continue his search down to the date that he himself acquires title.

This result may, however, be avoided in certain cases. X may claim priority over B if he takes title through a bona fide purchaser. As shown above, as between B and C, C would prevail if he was without notice of the prior conveyance to B. The court in Jones v Independent Title Co.(15) follows this to its logical conclusion by allowing X to take the clear title which C had obtained. This would mean that X could obtain C's clear title and not be subject to B's interest even if X had actual notice of the deed from A to B. The court states this in the following manner:

> "A bona fide purchaser can convey his entire interest or title free and clear of outstanding but undisclosed and unrecorded equities prior in point of time to the claims of such purchaser, even (with one exception which is not involved here) to a transferee or grantee with notice of such equities."

However, if C were not a purchaser in good faith, that is if he had notice of B's deed at the time he made his purchase he would not be given priority over B. X in taking title from C could not then claim a clear title derived from C. He could not claim to be a bona fide purchaser in his own right since he would be charged with constructive notice from the record of the deed to B since it was in his chain of title and recorded previous to the execution of the instrument conveying the property to him. This leaves X with no alternative except to search the records to the date of the conveyance to him and ascertain what interests had been created before he acquired an interest.

The purchaser as shown above would not be charged with notice of conveyances made and recorded subsequent to the time that a grantor in the chain of title had parted with title. He would, however, be charged with notice of those made prior, but recorded subsequently to the time that that party had parted with title. This distinction is highly theoretical, however, since in searching the records for those made prior but recorded subsequently the purchaser would automatically come across those made subsequently and recorded subsequently when he is looking for those made prior but recorded subsequently. Therefore, the purchaser would have actual notice of them and be bound by any effect they might have had on the former conveyance; of course, there is the possibility that the purchaser might be put on notice of these instruments from facts and circumstances outside of the record, such as possession.

VI. CONVEYANCES OF NEIGHBORING LAND BY THE SAME GRANTOR CONTAINING RESTRICTIONS ON LAND RETAINED BY THE GRANTOR AND LATER CONVEYED

The question presented in this section is whether a conveyance by a grantor of other property by a deed containing restrictions on the land retained by the grantor will impart constructive notice to an innocent purchaser of the property retained by the grantor simply because the deed was recorded? For example, A, owner of lots #1 and #2 conveys lot #1 to B by deed containing restrictive covenants which are mutually enforceable by A and B and which are applicable both to lot #1 and lot #2. Later, A sells lot #2 to C, who has no actual notice of the restrictions imposed on lot #2 by the former deed to B. The question the court is then faced with is whether C can be considered to have constructive notice of the restrictions contained in the deed conveying lot #1 from the record of it. This depends on whether such deed is considered as being in C's chain of title or not.

There is a split of authority in the United States on this question. The leading case of Glorieux v Lighthipe,(16) a New Jersey case, concluded that such deed was not in C's chain of title and, therefore, C was not charged with notice of any restrictions contained therein.

Other courts have, however, analyzed the situation and decided that the deed is in C's chain of title. This seems the more logical approach since the instrument does convey to the first grantee an interest in the land retained by the grantor. This interest may consist of an easement or a right to enforce certain restrictions. When such an instrument is recorded it is one of the links in the chain of title by which C became the owner of the property. It is in fact a prior conveyance of an interest in the property which C has purchased and since it is recorded and can be discovered by a proper search of the grantor-grantee books, it is logical to put a purchaser on notice of such a conveyance. The situation does not change just because the main purpose of the former conveyance was to convey neighboring land and not primarily to create an encumbrance on the land retained.(17) Any other conclusion would make the restrictive covenant to a great extent futile, since the grantor could then sell the remaining property and extinguish the effect of such a restriction.

The California District Court in Miles v Clark(18) has followed the approach that a subsequent purchaser has constructive notice of the restrictions in such a situation, even though the deed creating such restrictions is not technically in the grantee's chain of title. In this case the area had been subdivided and a general plan of development for the entire tract devised so that the property would be used for exclusive residences only. A map of the area was filed indicating that a general plan of improvement was being followed, but not expressly stating the various restrictions. The lots were all sold with reference to this map. The original owners contracted with each other as to what particular restrictions would be put on the lots and made them for the benefit of each and every lot in the tract and of the owners thereof. Several lots were sold with these restrictions in the deeds and recorded. Later, however, the original grantors rescinded their original agreement concerning the restrictions and sold lots subject to different restrictions and some lots apparently without any restrictions contained in the deed.

An action was brought by some of the owners to establish their equitable easement in all the lots in the area and to enjoin various land owners from violating the restrictions originally agreed upon. The courts in granting the injunction and declaring the existence of the easement stated that the purchasers of all the lots were subject to the restrictions whether their deed contained the express restrictions or not. The basis for this the court states is that the original deeds containing the restrictions were on record and therefore, subsequent purchasers of lots in the tract were on notice of their contents. In answer to the argument that the original deeds were not in the chain of title of the subsequent purchasers the court states:

> "Appellants insist, however, that they were only bound with constructive notice of those things which were within the course of the title to the land. While it is true that these defendants did not deraign title through a deed containing the restrictions, they did deraign title through the same grantors, the principal defendants herein, who themselves created the conditions. The deeds executed by their grantors limiting their title were of record. Mere ordinary prudence would have dictated an examination of these deeds to ascertain if the remaining lots were affected by them. The map of the tract was on file, and the sales were made with reference thereto, and it expressly indicated the existence of a building scheme. Under these circumstances we are of opinion that the documents of record constituted constructive notice not only of the existence of the building scheme, but also that the tract was burdened with certain easements."

This puts the burden on the subsequent purchaser to examine all the deeds which the grantors in his chain of title executed in regard to neighboring lands in order to determine whether any of them contained restrictions on the land which the subsequent purchaser is purchasing. He cannot tell from the index whether the particular instrument would

contain such a restriction or not and therefore, must look at each of these documents. If a plat system were used, these restrictions would show on the tract which was restricted and a subsequent purchaser of that tract could easily find this restriction. Under the grantor-grantee system, however, it is a serious burden to discover these documents.

It should, of course, be remembered that in a situation like this if there is actual notice or notice of facts and circumstances that would put a prudent man on guard, the purchaser must investigate. If he does not, he will be charged with notice of that which he would have discovered by a reasonably diligent search. The court in Miles v Clark states this very clearly: "In addition thereto, the general appearance and character of the tract, and the nature of the improvements thereon, ought to indicate to one interested the presence of some character of restrictions."

If this does not show up from the possession, however, it would seem that it is too great a burden to put on the purchaser to require him to investigate all the instruments involving neighboring lands which his grantor has executed.(19)

This chapter has developed the rule that the doctrine of constructive notice does not generally apply to instruments not in the chain of title, and has attempted to show when an instrument is not in the chain of title, although the courts are not always agreed on this point. Finally, an attempt has been made to show the difficulty a purchaser has in determining what interests of third parties his title will be subject to and what type of search he must make. This difficulty arises from the doctrine of constructive notice from facts and circumstances. It is very difficult for a purchaser to determine what facts would lead a reasonable man to make an investigation and just how far he should investigate to be fully protected.

FOOTNOTES to CHAPTER 9: EFFECT OF RECORDING INSTRUMENTS NOT IN THE CHAIN OF TITLE

1. 153 Cal 718.

2. 24 Cal 218.

3. 98 Cal 529.

4. Dobbins v Economic Gas Co., 182 Cal 616; Standard Oil Co. v Slye, 164 Cal 435.

5. Walters v Mitchell, 6 Cal App 410.

6. 38 Cal 44.

7. Cal. Stats. 1905, c. 443, p. 602.

8. 20 Cal (2) 574.

9. Cal. Amend. Stats. 1947, c. 1314, p. 2852, sec. 1.

10. Tiffany, Real Property, 1939, sec. 1230; Burby, Real Property, 1943, p. 442.

11. 85 Cal App 119.

12. 122 Cal App 391.

13. 34 Cal App 184; see also Baker v Fireman's Fund Ins. Co. 79 Cal 34; Duncan v Ledig, 90 Cal App (2) 7.

14. 41 Cal 41. Other decisions on this point are: Clark v Sawyer, 48 Cal 133; County of San Luis Obispo v Fox, 119 Cal 61.

15. 23 Cal (2) 859.

16. 88 NJ Law 199.

17. Tiffany, Real Property, 1939, sec. 1266, cited supra, footnote #10.

18. 44 Cal App 539.

19. See Moe v Gier, 116 Cal App 403 and Martin v Holm, 197 Cal 733, which limit the rule of Miles v Clark to situations in which there is a general scheme. See Chapter 10, infra, for further discussion of the rule of Miles v Clark.

Chapter 10: MATTERS OF WHICH RECORD IMPARTS NOTICE
(By University of Southern California)

I. INTRODUCTION

Civil Code Section 1213 provides for constructive notice from the record. It reads as follows:

> "Every conveyance of real property acknowledged or proved and certified and recorded as prescribed by law from the time it is filed with the recorder for record is constructive notice of the contents thereof to subsequent purchasers and mortgagees;..."

There are many cases interpreting this code section and discussing the question of what matters a subsequent purchaser has notice of from the record. In fact, constructive notice is emphasized by the courts very often when it is unnecessary to discuss the problem. This will be considered now.

When an instrument creating legal interests is executed the grantee of any interest under that instrument is given priority over a subsequent purchaser, provided the instrument is properly recorded first. It is unnecessary to discuss constructive notice in that situation. It is sufficient to state that the grantee had a common law priority which he preserved as against subsequent purchasers by recording. The courts, however, prefer to state that the subsequent purchaser can claim no interest since he has constructive notice from the record of the prior instrument.

When the first instrument creates an equitable interest, however, and the subsequent purchaser acquires the legal title there is no question of common law priority. The subsequent purchaser in that situation will have priority unless he has taken title with notice of the former equity.

He may have actual notice, which would cut off his priority. He may have constructive notice from the record of the first instrument or constructive notice from facts and circumstances which put him on inquiry. It is necessary in such a situation to discuss constructive notice in accordance with Civil Code Section 1213.

Another situation in which constructive notice from the record is important is when a subsequent purchaser records before a prior purchaser or the prior purchaser fails to record. For example, O, owner of Blackacre gives A a lease for five years on Blackacre. This lease is not recorded. O then conveys to B with a statement in the deed that the property is subject to a lease in favor of A. This deed is recorded. B then conveys to C, but the deed does not contain any statement of the existence of the lease in favor of A. Civil Code Section 1214 protects C against this prior unrecorded lease if C purchased in good faith, without notice, and for value. Notice will be the question involved in this case. The courts hold that C would be put on notice of the lease since there was a recital of the existence thereof in a recorded instrument in C's chain of title. The basis for this is that a subsequent purchaser is

put on notice of the contents of the recorded instrument and must investigate any references pertaining to unrecorded instruments.(1)

Bearing in mind that these are the only situations in which constructive notice from the record should be discussed a brief summary of the matters of which the record gives notice will follow.

II. NOTICE OF THE EXISTENCE AND LEGAL EFFECT OF RECORDED INSTRUMENTS IN THE PURCHASER'S CHAIN OF TITLE

A subsequent purchaser is put on notice of the existence of any instruments in his chain of title which are recorded and which might affect his title to the property. He is in addition, charged with notice of their legal effect against him.(2)

This would be important in a situation in which the prior recorded instrument conveyed an equitable estate. If it conveyed a legal estate notice would not be important since the first party would have common law priority which was preserved by his proper recordation.

An example of a situation in which notice would be important in this connection is as follows:

O, owner of Blackacre makes a contract to sell Blackacre to A who properly records his contract. O then purports to convey legal title to P who also properly records. A in such a case cannot rely on a common law priority since he had acquired merely an equitable title and P claims a subsequent legal title. However, the record of this contract of sale gives notice to P, a subsequent purchaser, as a result of the terms of Civil Code Section 1213 quoted above. P, therefore, cannot claim to be a bona fide purchaser without notice since he has notice from the record. He will not be given priority over A.

If A had received the legal title and recorded it would not be necessary to discuss constructive notice from the record.

III. NOTICE OF RECITALS CONTAINED IN RECORDED INSTRUMENTS IN THE PURCHASER'S CHAIN OF TITLE

A purchaser of real property will be charged with notice of any recitals in the instruments recorded in his chain of title. These may consist of the following types of recitals:

1. Recitals of Legal Interests
2. Recitals of Equitable Interests
3. Recitals Referring to Unrecorded Instruments or Instruments Outside the Purchaser's Chain of Title

A. RECITALS OF LEGAL INTERESTS

Recitals in these instruments may consist of recitals of legal interests such as easements, life estates, et cetera.(3) For example, O, owner of Blackacre conveys the property to B with a statement in the deed reserving an easement for O to have a road across Blackacre. B then conveys to P without any statement in the deed concerning O's easement. P will receive title subject to the easement in favor of O on the basis of either of two theories:

The first theory and the proper analysis is that O reserved a legal interest in Blackacre and he is in effect a prior purchaser of that legal interest, the easement for a road. A subsequent purchaser, P, would have no right to cut off the easement since O was first in time and, therefore, had common law priority. This priority was preserved by O when the instrument giving him such an easement was first recorded.

The second theory and the one generally followed by the courts is that P was put on notice of O's interest from the record and, therefore, could not claim to be a bona fide purchaser without notice. It is actually unnecessary to discuss this question of constructive notice since as discussed before O was first in time to acquire the easement and had retained his common law priority by recording first.

B. RECITALS OF EQUITABLE INTERESTS

Where the interest involved is an equitable interest constructive notice from the record is very important.(4) For example, O conveys Blackacre to A subject to restrictions on the use of Blackacre. The result is that O has retained an equitable interest which consists of the right to enforce these restrictions. A conveys to P without any mention to P of these restrictions. The deed by which P acquires title has no reference to these restrictions. At common law P, a subsequent purchaser of the legal estate without notice would not be subject to the equitable interest in O since equitable interests were cut off by a purchaser of the legal title, who purchased in good faith, for value, and without notice of the prior equity. However, under the California recording system the recording of the deed from O to A would give notice to P of the restrictions in the deed from O to A. He could not, therefore, be considered a bona fide purchaser without notice and would be subject to this prior equity in favor of O.

Since there is no common law priority given to O in this situation, it is necessary to resort to the doctrine of constructive notice from the record in order to protect O's interest.

Examples of legal interests are easements, reversionary interests after termination of a lease or breach of condition.

Examples of equitable interests are restrictive covenants, interest of a beneficiary under a trust, equitable servitudes.

It is now generally agreed that these equitable interests are enforceable against subsequent purchasers with notice. There are, however, a few situations in which the courts refuse to enforce covenants against subsequent purchasers even if they have notice.(5) The extent to which such covenants, et cetera, are enforceable is not within the scope of this paper. The main purpose of this discussion is to emphasize what recitals in instruments in a purchaser's chain of title he will be considered to have notice of from the record.

C. RECITALS REFERRING TO UNRECORDED INSTRUMENTS OR INSTRUMENTS OUTSIDE THE PURCHASER'S CHAIN OF TITLE

When an instrument is unrecorded it is void as against subsequent bona fide purchasers or mortgagees who properly record their instruments. Provision for this result is made in Civil Code Section 1214. In order to claim the benefits of this code section, the subsequent purchaser must prove that he had no notice of the unrecorded instrument at the time he made his purchase. This means no actual notice and no notice from facts and circumstances putting him on inquiry.

When there are recitals in recorded instruments in this purchaser's chain of title which refer to instruments which have not been recorded, the purchaser is required to make a reasonable investigation to discover the unrecorded instrument referred to.(6) For example, O, owner of Blackacre grants an easement to A for a road across Blackacre. This instrument is not recorded. O later conveys Blackacre to B subject to the easement in favor of A. This easement is expressly referred to in B's deed which is properly recorded. B later conveys to P who takes title subject to all recorded interests. It is his duty to search the record and find what interests are outstanding against the property he is purchasing. He will discover, through such a search, the reference in P's deed to the easement in favor of A. It is then his duty to investigate to the extent that a reasonable man would and try to discover the terms of the unrecorded instrument giving A an easement. If he fails to make a reasonable investigation he will be charged with notice of the contents of that unrecorded instrument if it could have been discovered by a reasonable investigation. This will prevent him from claiming as a bona fide purchaser without notice and, therefore, he cannot claim protection under Civil Code Section 1214 against this prior unrecorded instrument. If, however, the instrument could not have been discovered by a reasonable investigation he will not be charged with notice of it. If he has no notice from other facts and circumstances he will be permitted to claim as a bona fide purchaser without notice and, therefore, not subject to this easement in favor of A. The burden of discovering the instrument is on the subsequent purchaser. He must decide what a reasonable investigation consists of. It is a difficult decision to make. It is unfortunate whenever a purchaser is put on notice of instruments not on the record. It is in violation of the spirit of the Recording Act which is to make the record a true reflection of the state of the title. It fails to do this in several respects as is pointed out in Chapter 2 of Part IV.

As stated above, a purchaser will be charged with notice of an unrecorded instrument referred to in a recorded instrument if he fails to make a reasonable investigation to discover the instrument referred to. There is case authority limiting the notice in such a situation to notice of provisions which would generally be found in that type of instrument.(7) For example, if the unrecorded instrument referred to in a recorded instrument were a lease, the purchaser who fails to investigate is charged with notice of the ordinary terms of that lease, such as a covenant to repair, or give an extension or renewal. He would not be put on notice of an unusual provision, such as a covenant to purchase all the milk required by the lessor from the lessee.

A subsequent purchaser is generally not charged with notice of matters contained in instruments outside the chain of title. An exception is made in the following situation:

O is the owner of lots #1 and #2. He conveys lot #2 to A by recorded deed. In this deed are various restrictions which O and A have agreed to and which are made by both parties. For example, both agreed in this deed not to build structures over two stories high. O agrees not to build such buildings on lot #1 and A agrees to refrain from building such buildings on lot #2. These are therefore, mutually enforceable restrictive covenants. O later conveys lot #1 to X who claims that he is not subject to the restrictions on this lot. The California courts have held that the deed conveying lot #2 to A is not in X's chain of title, but nevertheless X will take subject to the restrictions.(8) This requires X to search the records for any conveyance by O of neighboring pieces of property in which O agreed to any restrictions on lot #1 retained by him. This matter was discussed in Chapter 9.

A second situation in which a purchaser may be charged with notice of matters in a recorded instrument outside his chain of title occurs in the following case:

A recital is contained in a deed in the purchaser's chain of title incorporating provisions in an instrument which is recorded but outside the purchaser's chain of title. For example, O, owner of lots #1 and #2 conveys lot #1 to P_1 by a deed containing certain restrictions on the use of this lot but with no statement of restrictions on lot #2 retained by O. This deed is properly recorded. Subsequently, O conveys lot #2 to P_2 and states in the deed, which is properly recorded, that this lot is subject to the same restrictions as those contained in the recorded deed from O to P_1. This reference puts P_2 on notice of the restrictions in the deed from O to P_1 covering lot #1 and makes lot #2 subject to the same restrictions. This in effect puts P_2 on notice of provisions in an instrument which is outside his chain of title. If P_2 then conveys to P_3 without any mention of restrictions, P_3 will have notice of the contents of the instruments in his chain of title. He will be charged with notice of the reference involving restrictions in the deed from P_1 to P_2 and must investigate to determine the restrictions against this party. This requires him to look at the original instrument from O to P_1 which set up the restrictions. If he fails to

investigate as a reasonable man he will be charged with notice of the restrictions and their applicability to his lot. He is, in effect, charged with notice of the contents of an instrument outside his chain of title.(9)

In any situation involving recitals in a recorded instrument the recital must be clear and definite. If the recital is too vague and uncertain a subsequent purchaser will not be charged with notice of the recital. (10)

FOOTNOTES to CHAPTER 10: MATTERS OF WHICH RECORD IMPARTS NOTICE

1. See discussion of these theories in the Introductory Chapter to this paper.

2. Brainard v Whitman, 11 Cal App (2) 32; Craig v Dinwiddie, 77 Cal App 681; Page v Rogers, 31 Cal 293; Black Eagle Oil Co. v Belcher, 22 Cal App 258.

3. There are many cases involving recitals of legal interests. For a case involving reservation of an easement see Hohenshell v South Riverside Etc. Co., 128 Cal 627; For cases involving reversionary interests of various types see the following cases: Quatman v McCray, 128 Cal 285; Childs v Newfield, 136 Cal App 217. For a case involving a conveyance subject to a condition precedent see: Brannan v Mesick, 10 Cal 95.

4. See Wayt v Patee, 205 Cal 46, for an illustration of recitals of equitable interests in the form of restrictive covenants. See also: Hunt v Jones, 149 Cal 297; McBride v Freeman, 191 Cal 152; Martin v Holm, 197 Cal 733; Guaranty Co. v Recreation G. Club, 12 Cal App 383.

5. L.A. Terminal Landing Co. v Muir, 136 Cal 36; Berryman v Hotel Savoy Co., 160 Cal 559.

6. Guerin v Sunburst Oil & Gas Co., 218 Pac. 949 (Mont.); Tiffany, Real Property, (3d Ed.) Sec. 1293.

7. Wilkerson v Thorpe, 128 Cal 221; See also: Garber v Gianella, 98 Cal 527.

8. Miles v Clark, 44 Cal App 539. See Chapter 9, supra, for further discussion of this problem.

9. Tiffany, Real Property (3d Ed.) Sec. 1293; cited supra, footnote #6.

10. Watson v Sutro, 86 Cal 500; Fishback v JC Forkner Fig Gardens, 137 Cal App 211.

Chapter 11: EFFECT OF FAILURE TO RECORD
(by University of Southern California)

I. INTRODUCTION

The common law rule governing priority was that the party whose instrument was executed first in time was given priority over any instruments executed subsequently. This rule applied as between two instruments transferring or creating legal interests in real property and also as between two instruments transferring or creating equitable interests in real property. If, however, the first instrument transferred merely an equitable interest, a subsequent purchaser of the legal title was given priority, provided he purchased in good faith, for value and without notice of the prior equitable interest.

The California statute follows the common law rule of first in time but adds an additional requirement. The first purchaser will have priority provided he records his instrument before a subsequent purchaser records his instrument. If he fails to record he may lose his priority. The California doctrine, therefore, gives priority to the first in time, provided he meets the statutory requirements of purchase in good faith, for value, and without notice of prior instruments and records first.

If the purchasers have both acquired legal or equitable interests the basis for priority is that the first in time has common law priority and by recording has protected it. If the first instrument involves an equitable interest and the second a legal interest the first purchaser, provided he records first, is protected on the theory that by recording he has given notice to the purchaser of the legal title. The purchaser of the legal title will not be able to claim priority as he would have at common law. It is necessary to base the decision on this theory since the first purchaser in that situation has no common law priority to be protected by recording.

If the purchaser who is first in time fails to record first he may lose his priority. Civil Code Section 1214 provides as follows:

> "Every conveyance of real property, other than a lease for a term not exceeding one year, is void as against any subsequent purchaser or mortgagee of the same property, or any part thereof, in good faith and for a valuable consideration, whose conveyance is first duly recorded, and as against any judgment affecting the title, unless such conveyance shall have been duly recorded prior to the record of notice of action."

If the subsequent purchaser records first and meets the requirements of Civil Code Section 1214 he will be given priority over the prior unrecorded conveyance. The subsequent purchaser must prove he purchased in good faith, for value, and without notice of the prior unrecorded conveyance. Here is the second situation in which constructive notice is important. The subsequent purchaser must prove he had no actual notice and no constructive notice in order to be given priority over the first purchaser who failed to record. The problems connected with

notice will be discussed below.

The purpose of this chapter is to determine what persons may assert the invalidity of a prior conveyance when such conveyance is unrecorded. These persons must be subsequent purchasers or mortgagees, who claim under an "instrument" authorized by the general recording statute, and who purchase in good faith, for value, and without notice of the prior unrecorded conveyance, and who record first. There is a special provision for certain judgment creditors. See Section VIII infra. The various elements which a party claiming protection under Civil Code Section 1214 must prove will be discussed below.

II. CLAIMANT MUST BE A SUBSEQUENT PURCHASER OR MORTGAGEE

Civil Code Section 1214 limits protection to subsequent purchasers or mortgagees. Prior purchasers who record are protected either because they have maintained their common law priority or because recording of their instruments has given notice to subsequent purchasers under Civil Code Section 1213. Therefore, Civil Code Section 1214 is designed for the benefit of subsequent purchasers who claim priority over prior unrecorded instruments. In addition, it protects these subsequent purchasers against other subsequent purchasers who record after they do.

For example, O, owner of Blackacre, conveys to A, who fails to record. O then conveys to B who records meeting all requirements of Civil Code Section 1214. O then conveys the same property to C, who records properly without notice of the prior conveyances. A is a prior purchaser who has failed to record. B is a subsequent purchaser who is protected against A by virtue of Civil Code Section 1214, since he is the first subsequent purchaser to record. By the same token he is protected against C, another subsequent purchaser. This code section gives priority to the subsequent purchaser who first records properly provided he meets the requirements of purchase in good faith, for value, and without notice. That would be B in this case. Therefore, B is protected against a prior unrecorded conveyance and against a subsequent purchaser who recorded after B recorded.

It is important to note that protection is expressly given to subsequent purchasers and mortgagees. It has been held that the grantee of a quit claim deed is considered a purchaser.(1) Therefore, the grantee under such a deed will be given priority over a prior unrecorded grant deed.

Subsequent creditors are not given protection under Civil Code Section 1214. The result is that the grantee under a prior unrecorded conveyance is given priority over a subsequent attachment or judgment creditor. Such creditor may not assert the invalidity of a prior unrecorded conveyance.(2)

However, a judgment creditor purchasing at his own sale is a purchaser and can invoke the protection of Civil Code Section 1214 if he meets the other requirements of that code section.(3)

The subsequent purchaser may be the purchaser of an equitable title as well as the purchaser of a legal title in order to obtain protection under Civil Code

Section 1214.(4) For example, O, owner of Blackacre gives A a trust deed on the property. This is not recorded. O then contracts with B to sell Blackacre to him. This contract of sale is properly recorded. B has acquired an equitable title under this contract of sale and will have priority over A, provided he meets the other requirements of the above code section.

In addition to subsequent purchasers the statute is expressly for the benefit of subsequent mortgagees. This means that a subsequent bona fide mortgagee who records first will be protected against a prior unrecorded conveyance.(5)

III. CLAIMANT MUST BASE HIS CLAIM ON AN "INSTRUMENT" AUTHORIZED BY THE GENERAL RECORDING STATUTE

What may qualify as an "instrument" under the general recording statute was discussed in Chapter 2. It will not be necessary to discuss that problem at this point. It is important to note that a person who claims priority under Civil Code Section 1214 must claim under such an "instrument". This means he must be a grantee under a deed, a lessee, a mortgagee, et cetera.

An attachment is not an "instrument" and, therefore, a subsequent party claiming rights against the property under an attachment will not receive priority over a prior unrecorded instrument.(6) This question could be dealt with merely by holding that a party claiming under an attachment is not a purchaser but merely a creditor and is, therefore, excluded from the terms of Civil Code Section 1214.

A judgment is not an "instrument" authorized by the general recording statute and, therefore, a subsequent party claiming under a judgment will be refused priority over a prior unrecorded instrument.(7) This question also could be dismissed by holding that such a party is a creditor and a creditor is not protected by the terms of Civil Code Section 1214. There is a special provision regarding a judgment involving the real property in question. This will be discussed below. The present discussion is limited to other judgments.

However, a judgment creditor who purchases at his own sale has been held to be a bona fide purchaser and entitled to protection.(8)

A sheriff's certificate of sale has been held to be an "instrument" entitled to recordation under the general recording statute. Therefore, a purchaser who receives such a certificate is protected under Civil Code Section 1214 against prior unrecorded instruments.(9)

IV. THE CLAIMANT MUST PURCHASE IN GOOD FAITH

The element of purchase in good faith requires that the purchaser have no notice of facts which would put a reasonable man on inquiry. For example, if the property is purchased at a price which is grossly inadequate this would be a circumstance that would cause a reasonable man to suspect a defect in the title to the property. Failure to make a reasonable investigation under such

circumstances would mean that the purchaser had not purchased in good faith. He should investigate to determine whether there had been a prior conveyance that had not been recorded. If no investigation is made the purchaser is considered to have notice of any matters he would have discovered by a reasonable investigation and may lose his standing as a bona fide purchaser.

The element of good faith is inseparably connected with the problem of constructive notice from facts and circumstances and will therefore, be discussed further in the section below on NOTICE.

V. THE CLAIMANT MUST PURCHASE FOR VALUE

The requirement of value is closely connected with that of good faith. The consideration for the sale of the property may be in money or its equivalent. For example, it may be the forbearance, suspension or surrender of a legal right to process for the enforcement of the collection of the debt.(10) The process of attachment is an example. It has been held many times that the cancellation of a pre-existing debt will be sufficient consideration.(11)

The court does not generally look into the adequacy of the consideration given. A small consideration may support the transfer of valuable interests in property.(12) However, as stated above, if the consideration is grossly inadequate this will be a circumstance bearing on the question of the good faith of the purchaser. For example, in Rabbit v Atkinson,(13) property worth $35,000 was given in satisfaction of a judgment for $184.74. The court stated in this case:

> "While mere inadequacy of consideration may not be sufficient to deprive one of his position as a purchaser for value, an offer by a vendor to sell for a grossly inadequate price is a circumstance which should place the purchaser on his guard and may be such as to require that he make a reasonable inquiry as to the title of the vendor not disclosed by the records."

A mere nominal consideration has been held to be insufficient. The court in Beach v Faust(14) states:

> "The recording laws were not enacted to protect those whose ignorance of the title is deliberate and intentional, nor does a mere nominal consideration satisfy the requirement that a valuable consideration must be paid. Their purpose is to protect those who honestly believe they are acquiring a good title, and who invest some substantial sum in reliance on that belief."

If the purchaser fails to prove he has paid value for the conveyance he will not be given priority over a prior purchaser who failed to record properly.(15) It should be emphasized at this point that a subsequent purchaser has the burden of proving his purchase in good faith, for value, and without notice.(16) If he fails to sustain this burden he will not be given protection under Civil Code Section 1214.

VI. THE CLAIMANT MUST PURCHASE WITHOUT NOTICE, EITHER ACTUAL OR CONSTRUCTIVE

There are two types of notice generally referred to in the California decisions. These are actual notice and constructive notice.(17)

A. ACTUAL NOTICE:

Actual notice means that a purchaser has actually seen the particular unrecorded instrument involved in the case. For example, O leases Blackacre to A for five years by a lease which is unrecorded. O then conveys Blackacre to B by recorded deed. O tells B that he has given a lease to A and shows the lease to B. B then has actual notice of the lease to A and takes subject to its terms.(18)

If the lease were not actually shown to B but he was aware that such a lease was in existence he would be put on inquiry as to the terms of the lease. (19) He would be required to make a reasonable investigation to discover the terms and conditions of such lease. If he fails to make such investigation he will be held to have constructive notice of what he would have discovered by a reasonable investigation.

If the agent of the purchaser has actual knowledge of the terms of the prior unrecorded lease, this knowledge is imputed to the purchaser, who is charged with notice of the terms and is subject to them.(20)

If the unrecorded instrument which the purchaser has actual notice of refers to other instruments the purchaser is put on inquiry as to the contents of the instruments referred to.(21) For example, O, owner of Blackacre, grants to A by an instrument in writing an easement to have a road over Blackacre. O subsequently conveys the property to B with an express recital in the deed making the conveyance subject to A's easement. Neither of these instruments are recorded. O then purports to give C the easement which he had formerly given to A. C has actual notice of the deed from O to B but no actual notice of the instrument from O to A granting this easement. C is, however, put on inquiry from the recital in B's deed and is required to investigate and discover the extent of A's interest. If he fails to make a reasonable investigation he will be charged with notice of the terms of the instrument referred to in B's deed if it could have been found by a reasonable investigation.

The court in the case of Basch v Tidewater Etc. Co.(22) has extended this doctrine to its limit. In this case the purchaser had actual notice of an unrecorded lease. The court held this put the purchaser on inquiry as to the existence of any supplemental agreement modifying the terms of the lease even though such agreement was unrecorded, was not referred to in the lease and of which the purchaser had no actual notice. This puts a purchaser under a duty to investigate to discover instruments which might possibly affect an instrument of which he has notice. This seems to be an extreme interpretation and will probably not be followed by the courts in the future.(23) The decision could be justified if there were certain circumstances present which would give the purchaser reason to suspect the existence of such an instrument. Otherwise, it is an undue burden put on a purchaser and seems to violate the spirit of the recording act.

When an instrument is not a proper instrument to record because defectively acknowledged, unacknowledged, or unauthorized, a subsequent purchaser is not bound by its terms even if it is accepted for record. The instrument is considered the same as if unrecorded. A subsequent bona fide purchaser would be protected against it by Civil Code Section 1214 unless he had actual notice of this instrument. If he had actual notice he would be subject to provisions in the instrument.(24)

In all cases involving notice the subsequent purchaser has the burden of proving that he had no notice, either actual or constructive at the time he made his purchase.(25) This involves proof that a reasonable investigation was made to discover documents and data relevant to the state of the title the purchaser is receiving, when such investigation is necessary.(26)

B. CONSTRUCTIVE NOTICE

The second type of notice is constructive notice. The effect of constructive notice is to charge a purchaser with notice of certain matters when he does not have actual notice of those matters. Constructive notice may be the result of recording, it may be the result of possession or it may be the result of facts and circumstances which put a reasonable man on inquiry. If a subsequent purchaser has constructive notice from any of these factors he cannot be considered a bona fide purchaser and will not be given priority over prior unrecorded instruments.

If the first instrument is recorded and conveys a legal estate the problem of notice is not present. If the first conveyance involves an equitable interest and the subsequent purchaser receives the legal title and records the problem of notice is present. Of course, when a prior instrument is not recorded the problem of notice is of paramount importance.

The situations in which a subsequent purchaser is charged with notice will be discussed below.

1. CONSTRUCTIVE NOTICE FROM THE RECORD

When an instrument is properly recorded the record operates as constructive notice to subsequent purchasers in that chain of title. This is considered a conclusive presumption of notice which cannot be rebutted.(27)

The problem of what matters a subsequent purchaser has notice of from the record has been discussed in Chapter 10. It will not be necessary to go into that problem at this time.

It should be noted, however, that a subsequent purchaser may be charged with notice of an unrecorded instrument because it is referred to in a recorded instrument.

2. CONSTRUCTIVE NOTICE FROM POSSESSION

A subsequent purchaser is required to make a reasonable investigation to determine what interests a party in possession of the property he is purchasing

claims. Failure to make such an investigation puts the subsequent purchaser on notice of any facts he would have acquired by such investigation.(28) This can be illustrated as follows: O, owner of Blackacre, conveys this property to X, who fails to record his deed. X, however, takes possession and remains in actual, exclusive possession and makes improvements on the property. While X is in possession O purports to convey Blackacre to P who records his deed. P, however, fails to make any inquiry concerning the interest which X might have in the property. Failure to make such inquiry puts him on constructive notice of the instrument from O to X which he could have discovered by questioning X, the party in possession.(29)

If the party is in possession under an unrecorded lease a subsequent purchaser must investigate to discover the interest of this person. For example, A leases Blackacre to B for five years but the lease is unrecorded. A later conveys the property to P who fails to investigate and discover anyone in possession. A will be put on notice of B's interest under the lease since a reasonable amount of questioning would have resulted in the discovery of the existence of the lease. P, therefore, takes subject to B's interest under the lease.(30)

Possession of a tenant will also put a subsequent purchaser on inquiry as to the interest of the landlord. For example, O, owner of Blackacre, conveys it to A, who fails to record the deed. A then gives X a lease for years which is also not recorded. O later purports to convey the property to P, who is not aware of A and X's claims. He is put on inquiry, however, by X's possession and must investigate to discover what interests both A and X have. If he fails to investigate he will be charged with notice of the fact that X is a lessee and that A is the owner under an unrecorded instrument. He will take subject to these instruments.(1)

If a reasonable investigation had been made and the subsequent purchaser were unable to discover the interest of the landlord in this case the subsequent purchaser would not be subjected to any interest the landlord might have under the unrecorded instrument.(2) The California cases have not determined what a reasonable investigation would be under these circumstances.

The party in possession may have an equitable interest in the property as well as a legal interest. If the legal title is subsequently purchased the purchaser will be required to investigate the interest of the party in possession. If he fails to do so he will be charged with notice of the prior equitable interest of the party in possession. For example, O, owner of Blackacre contracts to sell the property to A who fails to record the contract but takes possession of the premises. O then conveys legal title to B who is unaware of the former contract with A. B is put on inquiry as to A's interest by A's possession, and B will take subject to this contract of sale if it would have been discovered by a reasonable investigation.(3)

When the grantor remains in possession after he has conveyed the property a subsequent purchaser is put on inquiry to discover the interest the grantor may have retained. For example, O, owner of Blackacre conveys by recorded deed

to B. A remains in possession. B then reconveys the property to C by an unrecorded instrument while A is still in possession. A subsequent purchaser from B is put on notice of the possibility of a deed back from the fact of A's continued possession.(4)

This situation is likely to arise when the grantor has been defrauded or when there is no consideration paid for the conveyance. This can be illustrated as follows: A, owner of Blackacre is persuaded to give B a deed to the property. This was accomplished by fraud on B's part. The deed is properly recorded and B conveys to C, a bona fide purchaser. A subsequently attempts to quiet his title against C. A has in effect a prior equity which consists of a right to rescind the contract he made with B and recover his property. C, a subsequent purchaser of the legal title receives a title which is clear of this prior equity unless he had notice of the equity in A. The courts hold that the continued possession of A puts C on inquiry and he must investigate the right which A has. Failure to investigate charges C with notice of the prior equity. Therefore, C will not take free of A's right of rescission since he cannot claim as a bona fide purchaser.(5)

There should, of course, be evidence that the possession of the grantor continued over a period of time.(6) If the conveyance were made and the grantor merely remained in possession for a few days it would not seem reasonable to charge a subsequent purchaser of the property with notice from that possession. It would seem reasonable for the purchaser in such a situation to conclude that the grantor was merely staying long enough to settle his affairs preparatory to moving.

There are two further matters of importance in connection with this subject. They are the nature of the possession and the extent of the inquiry that must be made.

The possession must be open, notorious, exclusive, and visible. It must not be consistent with the record and must be of such a character that would put a prudent man on inquiry. It must indicate that someone other than the person who appears by the record to be the owner has rights in the property.(7)

There is some discussion in the cases as to the nature of the actual occupancy that is necessary. For example, erection of improvements by one not the record owner will be an indication to a subsequent purchaser that an adverse possessor is in possession.(8) If the area is used for grazing purposes, pasturage, et cetera, that is sufficient to put a subsequent purchaser on inquiry. Some authorities have required the area to be fenced in by the adverse possessor, but the modern approach seems to be away from that requirement.(9)

There must be something to indicate to the subsequent purchaser that one not the record owner is in possession. For example, if a large tract is partly cultivated and later an adverse possessor enters and cultivates the rest in the

same manner there would not be a possession that would put a subsequent purchaser on inquiry. A reasonable man would conclude that the true owner had merely continued to cultivate the rest of his tract. The possession must indicate that it is by one not the record owner.(10)

This leads to a discussion of the requirement that the possession must not be consistent with the record. If it is consistent a subsequent purchaser is not put on notice of any claims adverse to that of the record owner.(11) To illustrate, let us take the following situation:

A and B are tenants in common of lot A according to the record. A conveys his interest to B by an unrecorded deed which gives the entire title to A. A then remains in exclusive possession of the entire lot. Subsequently, B purports to convey his undivided share to C. C is not put on notice of B's conveyance to A because of A's sole possession. The reason for this is that a tenant in common has a right to exclusive possession, and it would be consistent with an interest as a tenant in common.(12)

In addition, the possession of the adverse claimant must be exclusive of the record owner. If the purchaser acquires title from the record owner who is in possession he is not put on inquiry by the fact that one not the record owner is also in possession. The purchaser need not investigate to find out whether the person sharing the possession has an interest under an unrecorded instrument.(13) This rule has not been discussed to any great extent in the California cases but will undoubtedly be subjected to some exceptions.

The final question to be discussed is that of the extent of the inquiry which the purchaser must make. The courts generally require a reasonable investigation to be made and due diligence must be used to discover the true state of the title.(14) If the subsequent purchaser questions the person in possession but receives a false reply he is excused from making further inquiry unless the answer would lead a reasonable man to suspect its veracity.(15)

There is no excuse for failure to investigate merely because it is difficult for the subsequent purchaser to visit and examine the land. He must hire another to examine it for him under those conditions.(16)

If the person in possession is away on vacation the subsequent purchaser is still required to make an investigation to discover whether the property is occupied and by whom.(17)

It should be noted before leaving this chapter that possession puts a subsequent purchaser on inquiry to discover unrecorded instruments and also puts him on notice of claims based solely on adverse possession without a claim under an instrument.(18)

3. CONSTRUCTIVE NOTICE FROM FACTS AND CIRCUMSTANCES OTHER THAN POSSESSION

Civil Code Section 19 provides that "every person who has actual notice of circumstances sufficient to put a prudent man upon inquiry as to a particular fact, has constructive notice of the fact itself in all cases in which, by prosecuting such inquiry, he might have learned such fact."

This means that if the subsequent purchaser hears or reads a statement concerning the title to the property he is purchasing which would put a reasonable man on guard he must investigate to determine the actual interests of persons other than the record owner in the property. The statement must be more than mere rumor or gossip but may be made by the record owner or a stranger to the title who has reason to know the facts. (19)

A circumstance putting a purchaser on inquiry is the fact that a vendor is willing to sell the property at a figure greatly disproportionate to its true value.(20)

When a reasonable investigation is made and no adverse claims have been discovered, the purchaser is not charged with notice of claims not on the record which may actually be in existence.

A problem is presented when the subsequent purchaser has no notice at the time he purchases the property and pays part of the consideration, but receives notice before he pays the balance of the consideration. In such a situation the court holds the purchaser is a bona fide purchaser to the extent of the payments made before he receives notice. He will be protected against the prior unrecorded interest to that extent only. (21)

If the purchaser has no notice at the time of the purchase and payment of the entire consideration he should be protected against the prior unrecorded conveyance even if he acquires notice before he records. In other words, in California a purchaser must be a bona fide purchaser at the time of purchase, but not necessarily at the time of recording.(22)

VII. THE CLAIMANT MUST RECORD HIS INSTRUMENT PROPERLY

The final requirement of Civil Code Section 1214 is that of recording. The subsequent purchaser who claims protection against a prior unrecorded instrument must prove that he recorded his instrument before any other subsequent purchasers. This requires proper recordation with the proper acknowledgment and without error in the recording process.(23)

The subsequent purchaser who claims protection against an instrument executed prior to his but recorded subsequently must prove that he recorded his instrument first in point of time and in a proper manner. He will then be given priority over the instrument executed prior but recorded subsequent to the recording of his instrument. He must of course prove purchase in good faith, for value, and without notice.(24)

If the subsequent bona fide purchaser has no notice of a prior unrecorded instrument his transferee will prevail even if he has notice of that instrument. The basis for this is that a bona fide purchaser may clothe his transferee with a good title regardless of whether the transferee had notice. If the transferee records properly before the grantee under the unrecorded instrument he will be given priority.

VIII. RIGHT OF JUDGMENT CREDITOR TO ASSERT INVALIDITY OF PRIOR UNRECORDED CONVEYANCE WHEN JUDGMENT AFFECTS TITLE TO THE PROPERTY

Civil Code Section 1214 states "Every conveyance of real property, other than a lease for a term not exceeding one year, is void...as against any judgment affecting the title, unless such conveyance shall have been duly recorded prior to the record of notice of action." This can be illustrated as follows:

A conveys property owned by him to B. C, claiming title to the property by reason of a prior equity, brings an action to quiet title in himself. If C files a lis pendens before B records his deed, C will be protected against this conveyance to B if C is awarded the judgment quieting his title. If, however, B records his deed before C files the lis pendens B will prevail. His conveyance will not be declared void. This provision and the exception thereto were discussed in detail in Chapter 2. The most important limitation occurs when the judgment creditor has actual notice of the prior unrecorded conveyance at the time he files his lis pendens. In that situation he is not protected against the grantee under the prior unrecorded conveyance.(25) The subsequent purchaser must make this grantee a party to the action when he knows of the conveyance at the time of filing the lis pendens.(26)

IX. CONCLUSION

This chapter has stressed the effect of failure to record an instrument. It has developed the qualifications of the parties who may assert the invalidity of an unrecorded instrument under Civil Code Section 1214. This concludes the analysis of the statutes and court decisions relating to the California recording statute. Chapter 2 of Part IV will summarize the defects that exist in the recording system that prevent it from achieving the purpose of notifying prospective purchasers of outstanding interests in the property they are considering purchasing.

FOOTNOTES to CHAPTER 11: EFFECT OF FAILURE TO RECORD

1. Beach v Faust, 2 Cal (2) 290; Dunn v Carroll, 101 Cal App 209; Allison v Thomas, 72 Cal 562.

2. Hunter v Watson, 12 Cal 363, construing 1850 statute on Conveyances.

3. Foorman v Wallace, 72 Cal 553; Hunter v Watson, 12 Cal 363, cited supra, footnote #2.

4. Keese v Beardsley, 190 Cal 465.

5. Filipini v Trobock, 134 Cal 441; Frey v Clifford, 44 Cal 335.

6. Iknoian v Winter, 94 Cal App 223.

7. Bank of Ukiah v Petaluma, 100 Cal 590; Pixley v Higgins, 15 Cal 127.

8. Hunter v Watson, 12 Cal 363, cited supra, footnote #2.

9. Foorman v Wallace, 75 Cal 553, cited supra, footnote #3. See Chapter 2 for discussion of sheriff's certificate of sale.

10. Frey v Clifford, 44 Cal 335, cited supra, footnote #5.

11. Ibid. See also Foorman v Wallace, 75 Cal 553, cited supra, footnote #3.

12. Frey v Clifford, 44 Cal 335, cited supra, footnote #5.

13. 44 Cal App (2) 752.

14. 2 Cal (2) 290.

15. Long v Dollarhide, 24 Cal 218.

16. Davis v Ward, 109 Cal 186; Eversdon v Mayhew, 65 Cal 163; Black Eagle Oil Co. v Belcher, 22 Cal App 258.

17. Fair v Stevenot, 29 Cal 488. See also Civil Code Section 18.

18. Eversdon v Mayhew, 65 Cal 163, cited supra, footnote #16, De Leon v Higuera, 15 Cal 483.

19. Fresno Canal Co. v Rowell, 80 Cal 114.

20. Watson v Sutro, 86 Cal 500; Stanley v Green, 12 Cal 148.

21. Tiffany, Real Property, (3d Ed.) Sec. 1293.

22. 49 Cal App (2) Supp. 743.

23. Compare Barber v Gianella, for extent to which purchaser is put on notice of other documents because of notice of a particular unrecorded instrument. Citation: 98 Cal 527.

24. Parkside Realty Co. v MacDonald, 166 Cal 426. See Chapter 7 for further discussion of this subject.

25. Wilhoit v Lyons, 98 Cal 409, Bell v Pleasant, 145 Cal 410.

26. March v Pantaleo, 4 Cal (2) 242 for example of a sufficient investigation.

27. Fair v Stevenot, 29 Cal 488, cited supra, footnote #17.

28. Possession of the proper types puts subsequent purchasers on inquiry as to the interests of the party in possession. This possession is not notice of his interest per se, but puts the purchaser on inquiry. If after reasonable investigation the purchaser is unable to discover what interest this person had he would not be charged with notice of that interest. See Thompson v Pioche, 44 Cal 508.

In the cases based on the 1850 statute it was decided that possession was evidence tending to prove notice and required the purchaser to make a reasonable investigation. It did not, however, put him on notice per se. See Introductory Chapter for a discussion of the early debates concerning notice from possession. See also early cases:

Lestrade v Barth, 19 Cal 660; Fair v Stevenot, 29 Cal 488, cited supra, footnote #17; Hunter v Watson, 12 Cal 363, cited supra, footnote #2; Landers v Bolton, 26 Cal 393; Kelley v Wilson, 33 Cal 690; Stafford v Lick, 7 Cal 479; Pell v McElroy, 36 Cal 268.

29. Dement v Pierce, 122 Cal App 254; Hunter v Watson, 12 Cal 363, cited supra, footnote #2. The case of Dement v Pierce involves a subsequent encumbrancer.

30. Beverly Hills Natl. Bk. v Seres, 76 Cal App (2) 255; Fowler v Lane Mtg. Co., 58 Cal App 66; Standard Oil Co. v Slye, 164 Cal 435; Security Loan & Trust Co. v Willamette Steam Mills, 99 Cal 636.

1. Fowler v Lane Mtg. Co., 58 Cal App 66, cited supra, footnote #30; Dutton v Warschauer, 21 Cal 609; Peasley v McFadden, 68 Cal 611.

2. Thompson v Pioche, 44 Cal 508, cited supra, footnote #28.

3. Moss v Atkinson, 44 Cal 1; Cohen v Hellman Comm. T & S Bk., 133 Cal App 758; Morrison v Wilson, 13 Cal 494; Jones v Marks, 47 Cal 242; Stonesifer v Kilburn, 122 Cal 664; Woodson v McCune, 17 Cal 304; Bryan v Ramirez, 8 Cal 467.

4. Pico v Gallardo, 52 Cal 206; O'Rourke v O'Connor, 39 Cal 442; Daubenspeck v Platt, 22 Cal 331; Pell v McElroy, cited supra, footnote #28; Austin v Pulschen, 112 Cal 528.

5. Taber v Beske, 182 Cal 214; Garrett v States, 3 Cal (2) 379.

6. Austin v Pulschen, 112 Cal 528.

7. Randall v Allen, 180 Cal 298; Mountain Club v Finney, 67 Cal App 225.

8. Kinsell v Thomas, 18 Cal App 683.

9. Havens v Dale, 18 Cal 359; Dissent in Gibbons v Yosemite Lumber Co., 190 Cal 168.

10. Gibbons v Yosemite Lumber Co., ibid. Randall v Allen, 180 Cal 298, cited supra, footnote #7.

11. Ibid, Randall v Allen.

12. Smith v Yule, 31 Cal 180.

13. Schumacker v Truman, 134 Cal 430; Aden v Vallejo, 139 Cal 105; Emeric v Alvarado, 90 Cal 444; McNeil v Folk, 57 Cal 323; Partridge v McKinney, 10 Cal 182; Porter v Johnson, 172 Cal 456; Sanguinetti v Rossen, 12 Cal App 623; Compare: Campbell v Brennan, 13 Cal App 601.

14. Smith v Yule, 31 Cal 180, cited supra, footnote #12.

15. Davis v Baugh, 59 Cal 568; Thompson v Pioche, 44 Cal 506, cited supra, footnote #28.

16. Thompson v Pioche, ibid; Shurtleff v Kehrer, 163 Cal 24; Harlanee v Brown, 21 Cal (2) 568; Whitmore v Ainsworth, 4 Cal Unrep. 872; Compare: Laughton v McDonald, 61 Cal App 678.

17. Taylor v Ballard, 41 Cal App 232.

18. Schaerer v Cuddy, 85 Cal 270; Keese v Beardsley, 190 Cal 465, cited supra, footnote #4.

19. See Chapter 2 of Part IV for further discussion of adverse possession.

20. Lawton v Gordon, 37 Cal 202; Beverly Hills Natl. Bk. v Seres, 76 Cal App (2) 255, cited supra, footnote #30.

21. Rabbit v Atkinson, 44 Cal App (2) 752, cited supra, footnote #13.

22. Davis v Ward, 109 Cal 186, cited supra, footnote #16; Combination Land Co. v Lorman, 95 Cal 552.

23. March v Pantaleo, 4 Cal (2) 242, cited supra footnote #26; Chapman v Osterparo, 73 Cal App 533, seems contra; see 14 California Law Review 460, for a discussion of the problem.

24. See Chapter 8 on effect of errors.

25. March v Pantaleo, 4 Cal (2) 242, cited supra footnote #26.

26. Moore v Schneider, 196 Cal 380.

Chapter 12: TITLE INSURANCE

(All of this chapter is taken from an article prepared by Mr. Lawrence L. Otis of the Title Insurance and Trust Company of Los Angeles, California. It is so complete and gives such a lucid description of the history of title insurance and of its characteristics and the procedures involved that to have condensed the article would have destroyed its value.)

A. DEVELOPMENT OF TITLE ASSURANCE METHODS

In a small and close-knit community, where land holdings are personal and not precisely delineated, actual possession by the family, passed on from generation to generation, constitutes the highest proof of ownership, and will seldom be disputed. As the community grows, holdings are divided and contracted; strangers, with no background of long and continuous occupancy, become owners; exact boundaries become important; and values rise. The only sure support for the owner becomes a paper title through which he can trace his right to the property in an unbroken chain of conveyances from the government, the original source of all titles.

The danger, as time goes on, that important papers--vital "links" in this "chain" of paper title--will be lost, destroyed or simulated, coupled with the bulk of the accumulation if all must be preserved over a long period, impel the establishment of a public repository for them, where they--or authentic copies--may be preserved and examined.

The solution adopted in the early days of the United States was the installation in each community--now, commonly, in each county--of a recorder's office, where such documents could be deposited, either permanently or long enough for the recorder to index and make copies of them. Preservation of originals, after copies were made, thereafter become of minor importance.

For a time this repository constituted a sufficient supplement to the known fact of occupancy. A person dealing with one recognized by his fellows as the owner, and having a good record chain of title, usually could safely rely upon such title. And, as time went on, less and less reliance came to be placed upon the fact of known possession and more and more upon the record title. True, the rights of anyone in actual possession must be recognized—that is always necessary—but the growth of dealings in land as in a sense a commodity, an investment, the repeated subdivision and resubdivision into progressively smaller holdings, the rapidity with which holdings change hands, and the more intensive improvement of such holdings, creating new and higher values, all contribute in time to the necessity of relying primarily upon a good record title.

At the same time, the multiplication of the number of documents affecting a particular parcel and their distribution among various offices made it increasingly difficult for people themselves to search the records

for the pertinent information and so they enlisted the help of men who began to specialize in such searching. From helping to find the records relating to the property, these men soon developed the business of furnishing summaries or "abstracts" of the pertinent documents, of bringing the essential information to the customer rather than simply of pointing out where it could be found.

In course of time, still further developments took place. First, it was observed that, up to a certain date, the chain of title to numerous parcels in the same area might be identical: only since the last resubdivision thereof would the instruments affecting the particular parcel differ from its neighbors. It was, therefore, both important and valuable to a searcher of titles, now known as an "abstracter", that he preserve all his previous "abstracts", since from them he could, in many cases, fix a date behind which he need not retrace his search: needing only to copy his previous work down to the point where common ownership of both parcels (the parcel previously abstracted and the nearby parcel under search) terminated, and then complete his search of the latter parcel from that date.

Second, it was logical that this saving of time and energy would be augmented if the abstracter had access to the abstracts of his compeers in the business; but each guarded his own abstracts as his principal stock in trade, and could only permit their use by others at a price. One solution was, of course, for abstracters with comparable stocks of completed abstracts to pool these resources and form an abstract company.

Third, it ultimately became apparent that the manner in which title papers were recorded--being copied into books from day to day, under various titles--deeds, mortgages, homesteads, etc.--was a costly factor, both in time and money, to their business. It was necessary to search every index from start to finish ("from beginning to date" is the trade term) in order to obtain the references to the necessary instruments, and then hunt out the various books from which to make their abstracts. In short, these instruments were not indexed according to the property affected so that a search of a "lot book" would give the required information. The really brilliant idea--the very foundation of modern examination of titles—was the development of lot books in the offices of the abstract companies wherein references to all recorded documents were rearranged according to the property affected for ready reference to all instruments relating specifically to a given parcel of property; at the same time reclassifying matters affecting the persons of the owners rather than a particular parcel of property in another set of books, alphabetically arranged, so that the examination of the lot books could be supplemented by a search for such matters as judgments, bankruptcies, probates, powers of attorney, property settlements, etc., having a bearing upon the title although not expressly relating to it. The latter set of books became known as the General Index--the "G.I." to the initiated.

Fourth, with the growth in population and the creation of additional offices for the preservation of essential data, e.g., tax offices, offices

of clerks of the various federal, state, and local courts, etc., the time consumed in traveling to and from all these offices, examining the pertinent records and abstracting (summarizing) their contents made the maintenance of an integrated title plant a practical necessity. Such a plant comprised--in addition to the collection of all past work in the form of abstracts--lot books and the general index kept up to date, maps both official and unofficial, and a collection of short summaries (sometimes called daily slips) of the instruments of record, so that the instruments not only could be identified but their general nature ascertained without resort to the records themselves. The excellence of any such title plant, over and above its accuracy and completeness in reflecting the records, is the extent to which these daily slips cover the information which otherwise must be gleaned from an inspection of the original instruments or the recorded copies.

All this, however, still related only to the compilation of the "chain of title", it did not involve the construction, interpretation, or legal significance of the various items or instruments comprising such chain. That was the work of the lawyer. Only a lawyer versed in the intricacies of land law and of the laws governing related subjects--corporation law, probate law, bankruptcy law, divorce law; in short, a host of laws, civil and criminal, having a bearing upon the capacity of the parties to the transactions forming the basis of the title—could authoritatively construe the instruments in the chain and reach a conclusion or "opinion" as to the current condition of the title. Not every lawyer was qualified by temperament, training or experience to examine abstracts and formulate a reliable opinion of the title. Besides, it was often a tedious business which did not have a universal appeal. It was natural that a few lawyers in each community should become expert at this business and achieve a reputation for reliable work, thus creating a demand for their opinions.

The concentration of this work in the offices of a comparatively few expert title lawyers in each community created, in times of increased business activity, cloying delays in the completion of land transactions. Moreover, in the field of legal construction of instruments affecting land, there is room for great divergence of opinion; and what one title lawyer would consider sufficient another lawyer would seriously question, engendering uncertainty as to the title which often required costly and time-consuming litigation to allay. Again, the costs of preparing a complete abstract of title to property which had passed through many owners and had been subjected to many dealings, plus the added costs of study and opinion by competent lawyers, were all too often far in excess of those warranted by the value of the property.

This system of abstract of title and attorney's opinion or certificate, developed as it has been to a high point of perfection over the past one hundred years, nevertheless has afforded and still affords a reasonably satisfactory method of establishing a merchantable title and is widely used in the United States to this day. It is the traditional method of establishing a "marketable" title--one that is apparent from the public records

without dependence upon proof of matters not disclosed thereby.

Before the turn of the century, however, experience showed that the abstract-opinion system of establishing title failed, in many instances, to meet the ever-increasing demand for a ready and reliable evidence of title. For one thing it proved to be too slow in a time of rapid movement of real estate; it cost too much when the instruments in the chain of title were numerous and the abstract consequently over-extensive. Moreover, the liability of the abstracter and of the attorney were limited to omissions and mistakes of judgment which a qualified person should not have made, limited also to the actual loss occasioned by the error and then only to the person for whom the work was done. Then, too, as a practical matter, recourse was limited by the financial responsibility of the abstracter or attorney and there were few legal requirements other than a bond. Bond and capital could, in too many cases, be wiped out by one substantial loss.

Two developments then took place which greatly expedited issuance of, and ultimately materially increased the protection afforded by, evidences of title. The first was the elimination of the abstract by the issuance of a "certificate of title". This was made possible by the development to a high degree of perfection of the "title plant" coupled with the great competence acquired by "examiners" in the employ of the company in the pursuit of their work of abstracting titles. These examiners had come to be quite as expert in construing titles as the title attorneys were; and abstract companies perforce also employed skilled attorneys to assist the examiners in their work. As a matter of fact, many such examiners were themselves law trained. Instead of preparing a formal abstract of title, supported by the opinion of a title lawyer, the abstract company would compile, from its records, a search of title, informal in character but sufficient for the purposes of its examiners and, having reached a decision as to the current condition of title, would furnish the customer a "certificate of title", in which the company simply certified that from its examination it found the title to be then well vested in the present owner subject only to certain encumbrances noted therein. This could be done much more quickly and cheaply and with equal satisfaction to the average customer.

There remained, however, the question of protection, which was essentially no different under the certificate of title than upon an abstract and opinion. The second development, accordingly, was the decision of the abstract company to guarantee the title rather than merely certify the correctness of its examination thereof. For such guarantee to mean much, it was obviously necessary for the issuing company also to show its ability to respond to losses if such should occur; accordingly, the company increased its capitalization and set aside reserves so that its customers might feel (and be) protected in relying upon such guarantees. And, recognizing that this innovation was in effect a contract of indemnity, i.e., insurance, the laws governing insurance companies were in many states extended to such "title companies" and they became subject to supervision, limitations upon investments and the issuance of securities, requirements of minimum capital and reserves, and so forth.

At this point, and as a preliminary to the consideration of the latest and most momentous step in the development of the science of assuring title to land—the policy of land title insurance--it may be well to contrast, briefly, the coverage and protection afforded by the certificate and by the guarantee of title. By its certificate of title the company states that it has examined the pertinent public records and certifies that the title to the property, describing it, is vested in a certain person, naming him, subject to certain exceptions, which are then enumerated, such as taxes, easements, restrictions, mortgages and other matters which it finds to be outstanding and unsatisfied. Also excepted are all the matters which are not disclosed by the public records examined, such as rights of parties in possession, capacity of parties to contract, undisclosed liens, matters of survey and location, and the like. Essentially, this is the substantial equivalent of the attorney's opinion reached upon his examination of an abstract of title, and it affords no greater protection--the responsibility of the company is contractual, that it has made a careful search and has exercised the requisite skill in reaching its conclusions. The measure of its care and skill in this respect is that commonly exercised by other competent members of the same profession. Except in instances of gross negligence this is, at best, an indefinite yardstick; and the uncertain outcome of a lawsuit against the company is not very satisfactory protection. The burden of proof is upon the injured party to show that the error indicates negligence amounting to a lack of requisite knowledge and skill.

Moreover, a perfect title is an unknown phenomenon. There are many flaws in title which ordinarily would have no standing in court but, until passed upon, must occasion confusion and dispute. It is a faculty of some nicety to be able to say in advance which of the innumerable technical defects encountered in searching title will or will not ultimately occasion litigation or loss. Every title company constantly is called upon to decide which of these defects to show and which to eliminate. A too generous elimination of defects multiplies the risk of losses; a too strict attitude invites the dissatisfaction of the customer. As a result, the company usually recognizes a moral responsibility to respond to losses occasioned by its failure to show matters which subsequently are asserted to the detriment of the title it has reported. Nevertheless, the liability upon certificates of title is limited, qualified and uncertain.

By the issuance of a guarantee of title, on the other hand, the company guarantees that the title is vested as shown therein and, as above stated, it becomes a contract of indemnity (Title Insurance and Trust Company v. City of Los Angeles, 61 C.A. 232). It is more than a guarantee of careful search and skillful analysis, it is a guarantee of the title of the owner. While it will show the title subject to the same exceptions as would a certificate, it is an undertaking to pay any loss the customer should sustain should the record title prove to be otherwise than as shown therein. It places an absolute guaranty behind the work of the title company. It means that the opinion of the company as to the validity of the title guaranteed is fortified by its agreement to make that opinion good in case it is mistaken and loss should ensue in consequence to the customer.

Thus the great advance of the guarantee over the certificate was--and is--that it substitutes a certain for an uncertain yardstick of liability. And, while the liability under either would be substantially the same should it omit any reference to, say, delinquent taxes against the property which the customer ultimately was required to pay, the liability would be entirely different were the error one of judgment in ignoring a defect which ultimately occasions a loss. Under the certificate, it would first be necessary to establish that the omission was negligent--one that an experienced examiner should have questioned; while, under the guarantee, the fact of omission, plus proof of loss occasioned thereby, would establish the liability of the company regardless of any lack of skill in failing to show it.

All of the arrangements so far considered have one thing in common--such protection as they afford is limited to those matters which are disclosed by an examination of the public records; and these records, particularly those in the recorder's office, are merely transcribed copies of original instruments themselves no longer available for inspection. Every person familiar with these records knows that there may be hidden defects which cannot be determined by examination or study of such records: defects arising from fraud, forgery, identity, competency, status, limitation of power, lack of delivery, failure to comply with law. Neither the abstract, the opinion, the certificate nor the guarantee of title affords any protection against such matters. They are "off-record" risks and, as such, not within the contemplation of such evidences of title. Yet these off-record risks may be determinative of the title.

It remained for the policy of title insurance to extend protection against such off-record risks and the scope of this coverage is continually expanding. Although the use of such a policy began nearly seventy-five years ago its rapid pre-emption of the field has occurred during the past thirty years, accelerated by the increasing demand for the greater coverage it affords as its advantages become more widely known and appreciated.

The demand for wider coverage than that afforded by abstracts, certificates and guarantees was first felt in the larger centers of population where the growth of corporate ownership of land, the intensive improvement of land and the use of land and improvements as security for the safe investment of trust funds and insurance company reserves necessitated greater concern for and protection of the underlying title. The more intensive use of land in urban areas likewise created greater complexity in titles--such things as complicated trusts, ground leases, encroachments, party wall agreements, new and novel easements above and below the surface, complete utilization of the surface necessitating close attention to boundaries, building restrictions, zoning laws and police and fire regulations. In short, substantial investors in large number required additional protection at a time when the examination of titles was becoming increasingly complex. This called for title companies with substantial means and adequate plants to give such increased protection, thus centering the work in established and progressive organizations.

Customer demands coupled with a growing realization of the inadequacies of existing methods led rapidly to the employment of title insurance in lieu of the older assurances of title. Companies issuing such policies in substantial numbers and large amounts, and upon the strength of which vast sums of money change hands with confidence, must necessarily be subjected to the same supervision and compliance with regulatory laws as other insurance companies.

B. TITLE INSURANCE PROCESSES

A title insurance policy represents the final result of three successive processes: investigation of title, determination of the amount of insurance required, and the protection of the insured, by the insurer, against possible title losses. The risk or chance elements in title emanate, of course, from three principal sources: errors in searching the records, errors in interpreting the legal effect of instruments found in the chain of title, and facts external to the record. An insurer meets the first two in much the same way as the abstract company. It will have at its disposal a title plant—the fact finding mechanism heretofore mentioned. It will have, also, a corps of carefully trained and experienced searchers and examiners. It will have competent legal assistance. The added element of hazard, the examination of the risks which lie outside the public records, which is the distinctive coverage of the policy of title insurance, requires additional precautions which will be considered in detail.

Before considering such outside or off-record risks, however, some further attention may be given to the scope of coverage of the public records, wherein the policy affords the same protection as the guarantee of title. The public records include those of every government office of which the public is required to take constructive notice. The records in the recorder's office are only a part. With reference to lands belonging to the federal government there are the land office records both local and in Washington, D.C. There are the numerous records of the State of California in the capital. There are the tax records of every taxing agency whose levies constitute a lien on real property--cities, counties, state, as well as numerous districts such as irrigation, reclamation and drainage districts; also special assessment districts the records of which are found in city and county treasurers' offices. There are the county and city clerks' records where governmental action relating to land is recorded, of which zoning, police and fire regulations are examples. There are the offices of county clerks where, among other things, records pertaining to corporations are kept; and the offices of the clerks of the various courts, state and federal, in which are maintained the files of cases affecting titles—litigation involving real property, or its owners, foreclosure of liens, partition suits, probate, guardianship and divorce cases, bankruptcy, and many others. In fact these offices are so numerous and so scattered that the usual examination of title cannot possibly cover them all. It is well known that upon the bankruptcy of a person all his property, wherever situated, passes by operation of law to the trustee in bankruptcy; yet it is impossible to search every bankruptcy court in the country, to make sure the owner has not been

adjudicated bankrupt since acquiring title. Accordingly, Standard policies, as do guarantees, except from coverage certain matters not disclosed by the records of the district court of the federal district, of the county, or of the city in which the land is situated.

The mere examination, summarization and classification of all this data--every instrument, entry, action and decree, from the government patent to the filings, entries and actions made and taken just the day before--and the posting of all this information to the (plant) records of the insurance company with accuracy, care and fidelity is an undertaking of great magnitude especially in populous counties--when, in Los Angeles County for instance, recordings alone now approach a million instruments a year.

This is not alone a major physical undertaking, extensive as it is, but an extremely delicate one from the standpoint of liability. Since the main purpose of all this effort is to reclassify all of the data according to the property affected, so far as possible, it is readily apparent that absolute accuracy is essential to the proper performance of the function of collecting (abstracting) the pertinent data and reclassifying (posting) it to the land records (lot books) of the insurer. From there on, the insurer will place primary reliance upon its own records (plant), so that if an instrument is posted to the wrong property, that instrument will almost certainly be overlooked in the later process of searching, examining, reporting and insuring the title to the property. A not inconsiderable percentage of losses on policies is directly attributable to mistakes in the performance of this vital function.

The second function of great importance in the examination of titles is the interpretation of the instruments in the chain of title. If accuracy is the prime requirement of the posting process, knowledge and experience are the indispensable prerequisites in construing the validity and effect of the instruments in the chain of title. It must first be ascertained that the necessary persons have joined in its execution--not just have signed their names but have been correctly designated as parties thereto and have properly acknowledged execution thereof. The instrument must appear to be legally sufficient to accomplish its intended purpose, to identify the property correctly and be consistent with the prior title. If it be a lease or trust it must have a valid term and purpose; if it be a deed creating or reserving immediate or future interests, such interests must conform to the laws governing their nature and extent.

It is not always the long or complicated instrument which causes the most difficulty. A deed from A to B for life, remainder to the heirs of A can be expressed in two lines and yet require close study of court decisions in many jurisdictions over a period of more than two hundred years (there being no exact precedent in California--but see Bixby v. California Trust Company, decided in March, 1945, 68 A.C.A. 297) before the conclusion can safely be reached whether, after delivery of such deed, A and B together can convey a good title to the exclusion of the ultimate heirs of A.

In recent years increasing use has been made of the trust form of management and disposition of real property and distribution of the income and avails among beneficiaries. Such trusts provide in detail the powers which the trustees may exercise. It is express law that acts of trustees in contravention of such trust are void. (C.C. 859) In any transaction involving dealings with or dispositions of property by such trustees, care must be exercised to determine that the transaction is consistent with and not in excess of the powers conferred on them.

The third function of importance in examining titles is the inspection and analysis of all judicial proceedings affecting titles. These occur periodically in every chain of title: probate proceedings, in case of the death, minority or incompetency of someone connected with the title; bankruptcy of a party, foreclosure of a mortgage or mechanic's lien; divorce, affecting homesteads, community and often the apparently separate estate of married persons; condemnation and partition suits; disputes over boundaries, encroachments, building restrictions, community driveways and other matters not otherwise disclosed by the records; specific performance actions disclosing off-record contracts of sale; and among any number of other types of litigation directly or indirectly affecting title, quiet title suits of all kinds and such purely personal actions as suits for money resulting in judgments which are afterwards enforced by execution sales of land.

All such proceedings must be examined whenever land is involved therein or affected thereby and their existence is disclosed of record by lis pendens, attachment, mechanic's lien or other record evidence; in fact, all such proceedings are examined and posted by title insurers because of their off-record coverage to be mentioned later. The examination of such proceedings must take into consideration the nature of the action, the necessary parties thereto, the jurisdiction of the court both as to parties and subject matter and as to any limitations upon the power of the court to render specific relief. For instance, it must appear that the court has acquired jurisdiction by due service of process. Thus an execution sale and deed could not be given effect if based upon a money judgment against a nonresident after publication of summons in a simple suit for money. Yet if, in such suit, publication of summons had followed the attachment of specific property of the defendant and the court in due course had ordered such property sold to satisfy the liability of the defendant the sale would be legal. The decree of a probate court determining the validity of an assertion of title adverse to the estate cannot be accepted (unless the adverse claimant be the representative of the estate) for the probate court does not otherwise have jurisdiction to determine such adverse claims.

The examination of such proceedings must also include a determination of the exact nature of the relief awarded and its effect upon the title; whether the judgment is final or still subject to direct attack. It is often unsafe to rely upon a judgment that is not final; it could very possibly be reversed on appeal and a retrial result in an entirely different judgment. On the other hand, in many cases it is unnecessary to await expiration of the period of direct attack (i.e., the time within which to ap-

peal, to move to vacate for inadvertence, mistake, etc., or to set aside default judgments--C.C.P. 473, 473a) because of the unlikelihood of any such attack, as, for instance, in an ordinary uncontested probate sale or simple decree of distribution. Considerable discretion has to be exercised, however, in making such decisions.

A fourth important function in the examination of titles is the consideration of all data pertaining to unpaid taxes and assessments. Tax records are scattered in many offices; tax descriptions often vary materially from record descriptions; tax deeds are not always issued, not always recorded. Protest and invalidity suits, bond foreclosures and treasurer's sales may be outstanding. There may be overlapping assessments or assessments and bonds issued under more than one of the many improvement and bond acts. Taxes and assessments do not ordinarily outlaw by lapse of time and so cannot be ignored even though enforcement may be barred. There are exceptions to this statement (see chapter on Taxation); it is enough here to state that the examination of taxes and assessments requires great care for the special reason that their enforcement, if valid, results in the creation of a new title and the extinguishment of practically all prior private interests so that, if overlooked in insuring title, the insured might easily suffer the complete loss of his property and the insurer be required to pay the full amount of its policy.

C. PROTECTION AGAINST OFF-RECORD RISKS

The outside or off-record risks which can be insured against by the policy of title insurance alone among the recognized means of assuring title are legion--consequently it has been necessary to discriminate among them and to develop several types of policy varying in their coverage of such risks. In a majority of cases, however, concern is centered upon certain more or less common or usual off-record risks and a standard form of policy used which affords protection against them, while at the same time excluding risks which the insured himself ordinarily can safely take. Other forms of policy have been developed to protect the customer against the latter, but the assumption thereof entails additional investigation on the part of the insurer for which extra premiums must be charged. Consideration, accordingly, first will be given to the coverage of the Standard policy; followed by discussion of the extra-coverage, extra-premium policies.

The principal off-record risks which the customer himself has to assume in relying upon abstract-opinions and certificates of title inhere in most transactions. These relate to the identity, competency and powers of the parties to the transactions reflected in the chain of title and to the bona fides of each such transaction. Thus, the hazards which the policy of title insurance primarily was developed to cover relate to the identity and capacity of the parties. Every such policy protects a bona fide purchaser or encumbrancer against forgery, false personation or dealings in title to land by a name differing from that in which title is vested of record, and like protection against loss due to lack of capacity on the part of any party to any transaction involving the title to the property.

Everyone knows that a forged deed, or one not executed by the real owner, even though it be signed by a person of the same name, is ineffective to pass the title--indeed, has no legal effect whatever. Yet such a deed will have the "appearance", on the records, of being just as effective as one properly made by the true owner. The hazard of forgery or false personation somewhere in the chain of title is, of course, a serious off-record risk, and insurance against such risk a substantial contribution to the protection of the customer. It is not a risk lightly to be undertaken by the insurer; and title insurers take constant precautions to guard against loss due thereto. As an illustration, reference may be made to the requirement of many insurers that, in every transaction, the parties personally sign statements of identity, containing essential personal information about themselves, which is preserved in the files for future reference. Such statements have proved to be of great value in establishing the bona fides of subsequent transactions, as well as in eliminating many apparent defects of title involving persons of similar name, besides affording a ready reference for comparison of signatures, ascertainment of marital status, alienage and the like.

The competency of parties to transactions in land is often a matter of vital import of which the public records afford no clue. Competency involves questions of minority, insanity, death or presumed death. Dealings with or dispositions of land by a person under the age of 18 are void; by one over 18 and under 21 (unless a married woman) at least voidable. Such a transaction by a person adjudged incompetent are likewise void; by a person incompetent in fact, often voidable, if not void.

Guardianship proceedings may be pending in another county or another state; no evidence thereof will, in many cases, appear in the records of the county where the property is situated. An interested party may have been missing for over seven years; there is a presumption that he is dead, yet that presumption will not support the probate of his estate, will not bind him if he reappear.

The status of each person involved in the chain is of great importance in passing on titles. This is readily appreciated with reference to marital status--the obvious necessity of the joinder of the wife in the disposition of community property, for instance; but it also arises in cases of bankruptcy, for example the rule that property inherited by a bankrupt within six months after bankruptcy forms a part of the estate in bankruptcy--an exception to the rule that one need not examine the records antedating acquisition of title to ascertain if, perchance, a person has undertaken to deal with it before he acquired title; in cases of alienage, as where a person ineligible to citizenship acquires title, thus subjecting it to escheat under the alien land law; or where a "blocked national" attempts to effect a transaction contrary to wartime Treasury controls; or where an unincorporated association, such as a common-law trust or religious society, or an individual doing business under a trade name, takes title in the fictitious name employed to designate it or him, contrary to the principle that legal title cannot vest in a fictitious entity incapable of acquiring title, even

though the individual or association, by paying the consideration, becomes the equitable owner.

Close attention must also be given to the powers conferred upon agents and fiduciaries under powers of attorney, trusts, and the like and, by law, upon governmental agencies, corporations, partnerships and other associations. An example that recurs with great frequency is the question of the power of an agent, trustee or public body, having the power to lease land, to lease for the development of oil or gas or, under trusts, to lease (for any purpose) for a term extending beyond the duration of the trust, unless the declaration of trust specifically so provides. The powers of a domestic or foreign corporation may be incapable of exercise through expiration, suspension or forfeiture of its charter although this will nowhere appear in the public records of the county where its property is situated. A married woman may confer broad powers upon her attorney-in-fact in the disposition of her property, yet such power will not be sufficient to enable him to join on her behalf in the disposition by her husband of community property unless it specifically so provides.

Delivery is an essential element of the validity of any instrument affecting the title to real property--delivery with intent to pass (or charge) the title, yet this vital act cannot be established by the public records; recordation of an instrument being only presumptive of delivery and this presumption rebuttable. A deed executed in blank can only be completed by another under written authority in that regard, which will seldom appear of record. Cross-deeds, their operation conditioned upon the happening of some future event, are ineffective, as are deeds placed in escrow and delivered in disregard of the conditions thereof. 1 So. Cal. Law Rev. 32).

Then there are the laws of the land, federal, state and local, having a direct and intimate impact upon the title to property and requiring constant study and attention in order to protect persons dealing with land, who deal, it is true, with presumed knowledge thereof--for everyone is presumed to know the law--but in all too many cases without a clear appreciation of their bearing upon the title. Again it is hardly necessary to mention the often completely "off-record" interest of a wife in property standing of record in the husband. Consider, however, the many technical rules relating to joint tenancies, to homesteads, to partnerships, just to mention a few. A difficult situation is created by the possible lien of federal estate taxes, which arises at the instant of death, requires no notice to anyone and is only released by payment or through such arrangements with the commissioner of internal revenue as are sanctioned by the revenue laws. The title of even a good faith purchaser, under probate proceedings or otherwise, is nevertheless subject to such a lien.

The list of laws which must be considered in passing on titles could be extended indefinitely; as could the decisions of appellate courts, having the force of law, which must also be studied and noted--for example, the rule that the enforcement of a deed of trust by trustee's sale on default will not eliminate an admittedly subordinate lien for federal income taxes. (Met. Life Ins. Co. v. U.S., 107 Fed. (2d) 311)

Not the least important of the risks against which a policy of title insurance affords protection are the costs, expenses and attorneys' fees incurred in defending the title insured by the policy against the hazards of litigation. This protection is in addition to the stated liability for loss of title and it covers the defense of unsuccessful attacks upon the title as well as those having merit. A well known example is the recurrent efforts of those who persist in laying claim to land covered by the Spanish and Mexican grants, notwithstanding the innumerable occasions upon which their validity has been reiterated. A spirited attack of this kind can be very expensive to defend, necessitating the recompilation of all the data supporting the grants and the exposition of the history, laws and prior proceedings going to establish the integrity of the titles predicated thereon. Again, differences over the interpretation of instruments in a given chain of title often result in litigation unforeseen or unanticipated at the time the policy was issued. Title insurers promptly and willingly defend such litigation whenever title insured by them is called into question. They also initiate litigation designed to eliminate claims and clouds on title arising out of matters insured against by their policies.

D. RISKS NOT INSURED AGAINST IN STANDARD FORM POLICIES

The protection afforded by the Standard policy may also be determined, however, by the off-record matters against which it does not insure. The Standard form of policy of land title insurance in general use in California (the C.L.T.A.--California Land Title Association--form) does not insure against:

1. Loss arising from defects or other matters concerning the title known to the insured to exist at the date of the policy and not theretofore communicated in writing to the insurer. No one could undertake to protect a person against facts of which he is cognizant and does not disclose. Insurers are not mind readers. Should a man knowingly buy land from a sixteen-year-old, a fact not known to the insurer and not disclosed in its examination of the title, the buyer could hardly expect the insurance company to indemnify him against his own folly, should his purchase be nullified. There are, however, many instances of a less obvious character, where the failure of the insured to communicate to the insurer essential facts pertaining to the transaction relieves the insurer of liability for loss attributable thereto. This would be true where the transaction was induced by the fraud, duress, undue influence or mistake of the insured. It would be true where the insured dealt with a person knowing him to be married, where he nevertheless held title of record and purported to deal with it as a single man; where the insured knew that the person he dealt with was under some disability unknown and undisclosed to the insurer. Indeed, awareness of this limitation upon the liability of the insurer has led careful persons to make a full disclosure of all circumstances pertaining to transactions on which they seek the protection of title insurance.

2. The Standard policy excepts from coverage easements and liens which are not shown by the public records. This exception stems from two factors--first, a good faith purchaser is entitled to rely on the public records, and title acquired in good faith and for value without knowledge of off-record interests and liens will be superior thereto; and, second, easements apparent on the ground and liens, such as mechanics' liens which can be anticipated by observation of construction in progress upon inspection of the premises, fall within the further exception from coverage of facts which such inspection will reveal ((3) and (4) below). Thus, if a private way is apparent from an inspection of the land, or a power line actually crosses the property, or a building is in course of construction, suggesting the possibility of unpaid materialmen's or laborers' claims, these things will be readily apparent to a person about to deal with the property and with which he accordingly is charged with notice as fully as though such rights appeared on the public records. The insurer would have to make an inspection of the land to be able to insure against such off-record easements and liens, and the Standard policy is issued without any such inspection. As will be shown, such matters are covered by the extra-coverage, extra-premium policies discussed below.

3. The Standard policy does not cover the rights or claims of persons in possession of the land which are not shown by those public records which impart constructive notice. Here again, such rights can only be ascertained by inquiry of the parties in possession. Rights of persons in possession are, from the fact of possession alone, just as effective against persons dealing with the land as are rights evidenced by the public records. Possession is constructive notice of all the rights which the person in possession actually has just as fully as is constructive notice by the records. It is incumbent upon anyone seeking to acquire an interest in land to make inquiry of all persons in possession thereof, and he is deemed to have constructive notice of all facts which such inquiry would disclose. Such possessory rights might exist under an unrecorded lease or license, might include rights under a modification agreement pertaining to such a lease, might include an option to purchase the land or might depend entirely upon adverse possession against the interests of the true owner. If there is a billboard on the land, inquiry of the owner of the billboard may disclose that he is paying rent to a stranger to the record title; and inquiry of such stranger might disclose that he holds an unrecorded deed to the property from the record owner. As, under the Standard policy the insurer does not make an inspection of the property, the rights of parties in possession are not covered and this risk must be assumed by the insured. Since in most cases the insured will have inspected the property as a normal incident of the transaction and will thereby have become conversant with the character of any possessory interests, he will ordinarily be willing to assume the risks incident thereto and will not need extra protection, otherwise he will procure the extra coverage necessary

to protect him in that regard.

b. The Standard policy does not cover the facts, rights, interests or claims which are not shown by those public records which impart constructive notice, but which could be ascertained by an inspection of the land or by making inquiry of persons in possession thereof, or by a correct survey. It will be observed that these exceptions are, again, relative to rights which are apparent on the ground, and which will be observed by the insured as a normal incident of the transaction in which he is interested. He has become interested in that particular parcel of property as a prospective home, or investment, or as security for the loan of money. It is the land with which he is really concerned; it is but an incident thereof that he seeks the protection of title insurance, primarily assurance that the title thereto is marketable. The physical characteristics are elements that appeal to him and as to which he is normally the best judge. If it is a lot in a subdivision or a parcel in a built-up neighborhood, he is not too much concerned with hidden defects in boundaries, in surveys, in encroachments, and such matters. He can buy or build with reasonable assurance, as a practical matter, that he will not be disturbed. If, however, he contemplates such use or enjoyment of the property that he will require substantially the entire parcel for his purposes, as where he expects to erect improvements which will occupy the whole area, say an apartment house or office building, built exactly to the boundaries, he requires further assurances as to the exact location of those boundaries and needs to be sure that buildings on adjoining property do not encroach on his. This necessitates a careful survey, requiring the services of competent surveyors or civil engineers. Title companies do not ordinarily render such services in any case; but, in special instances, will insure against such matters if furnished a correct survey.

5. The Standard policy does not cover mining claims; reservations in patents; water rights, claims or title to water, whether or not of record. One does not encounter mining claims or reservations in patents to property originally embraced in the Mexican grants, nor would such claims or reservations be of any importance in connection with the title to urban property. In cases where they would be or become important their existence should be ascertained--as to mining claims by a careful inspection of the land itself, particularly in areas where mining has at one time or another been pursued; as to reservations in patents, by a re-examination of the patent, or the record thereof, and of the particular laws under which it was issued since, if the law required the patent to contain certain reservations, such reservations may have become effective by operation of law even though actually omitted from the patent in question. Water rights depend upon too many elusive factors to make it possible to cover them in the Standard policy, and even a good record title to a certain amount of water gives no assurance that the supply is adequate or available.

6. The Standard policy does not cover acts or regulations of any governmental agency regulating the occupancy or use of the land or any building or structure thereon, such as zoning ordinances. While important in relation to the use of property in many cases, and therefore having a bearing upon the title and binding an owner the same as other laws, it has not been found practical to attempt to extend the coverage of title insurance to the inclusion of such regulations, principally because the regulations are constantly being changed, so that a policy written one day correctly reflecting the regulations then in effect would be good for that day only and could give the customer no assurance whatever that they would not be changed the next day.

The off-record risks which are thus not covered by the Standard policy of title insurance can, however, be insured against by a title insurer, either by the insertion in the Standard policy of a special endorsement undertaking such extended coverage or by the employment of special forms of policy.

B. SPECIAL ENDORSEMENTS

These are furnished, in proper cases for such situations as: protection to lenders, not afforded by the Standard policy because of the exception of liens which are not shown by the public records, against the assertion of priority by a mechanic's lien claimant--limited however, to insurance that the lender's mortgage or deed of trust has been recorded prior to the inception of the work of improvement and of which such claim of lien emanates; protection of the insured against forced removal of encroachments upon adjoining land--of particular importance to lenders who do not want a part of the security destroyed after the loan has been made, as for instance where the wall of an apartment house is built, say, six inches over the side line of the lot, but the insurer is willing to afford the lender such added protection because of lapse of time, waivers, or other considerations (usually off-record, as is the encroachment itself) indicating that no action to enforce removal is likely to be made or sustained; insurance against loss by reason of an existing violation of private building restrictions, based upon an inspection of the property and the neighborhood, and relying upon laches, waiver, abandonment, invalidity, changed conditions or other persuasive factors. These are examples of situations giving rise to special endorsements which can, however, be adapted to any situation where the insured desires special insurance against a particular risk, whether on or off-record, which the insurer is willing to undertake. Such an endorsement is specially appropriate where certain defects in title appear of record, and are known to the parties, so that omission of all mention thereof in the policy would be improper, but where the insurer is reasonably satisfied the defect will never occasion any loss. The defect, accordingly, is noted in the policy but an endorsement is added protecting the insured from any loss occasioned thereby. Illustrations of such defects on or off record, might be: unlimited restrictions upon the use of land which for various reasons are known or believed to be unenforceable; easements of record but long in disuse and un-

likely ever to be claimed; etc.

F. A.T.A. AND FULL COVERAGE POLICIES

In section D it was explained that the protection afforded by the Standard policy is subject to certain standard exceptions of matters not covered or insured against; and it was stated that these risks are, in the main, matters which the customer himself can assume as a result of his own inspection of and familiarity with the property. There are occasions, however, where the customer cannot or will not assume such risks and special extra-coverage, extra-premium policies have been devised to assume most of those risks. Perhaps the first customers to request such added protection were institutional lenders such as the large eastern life insurance companies who were not in a position to make or rely upon personal inspection of the property, and for whom the American Title Association form of lender's policy (A.T.A. policy) was devised which, in addition to the usual coverage of the Standard policy "ruled out" or eliminated the standard exceptions referred to in paragraphs (2), (3), (4) and (5) of section D, supra, viz. off-record easements and liens, rights of parties in possession, rights and claims which an inspection of the land or a correct survey thereof would show, and mining claims, reservations in patents and water rights. This extended coverage was made possible by the acceptance by the insurer of the responsibility of inspecting the property in each case, as well as a competent survey (not prepared by the insurer) and of determining whether any such rights or claims existed and, if so, its nature and extent.

Interesting problems have been encountered in providing such added protection. In one instance the existence of a heavy underground telephone cable was not disclosed by either survey or careful inspection; it was only discovered when, after issuance of the policy, excavation with a steam shovel brought it to light, neatly severed, disrupting the telephone service and necessitating costly repairs. Perhaps only an experienced lineman could have divined its existence by the existence of special manhole covers in the vicinity. Certainly the average person relying upon his own examination of the property would hardly have suspected it ran underneath that particular parcel. There is a legal principle that certain buried water lines and sewer pipes are "visible", though completely hidden from the surface, simply because their use is reasonably necessary and continuous. Such lines may connect improvements located on adjoining property on one side with a main in the street on the other side, thus running directly across the land under consideration. Again, only excavating will reveal them, yet an off-record or implied easement may exist, preventing removal, to the amazement of the innocent owner of the land.

Inspection or survey often discloses a variety of encroachments such as overhanging buildings even, on occasion, one which is within the lines at ground level but departing from the perpendicular so as to encroach upon adjoining property several stories up; architectural details, cornices, flag poles, fire escapes, hydrants, signs; party walls, boundary fences or trees; community driveways; faulty surveys; and even streets, improperly centered,

so that they do not conform with record easements, shortages or excesses on the ground, so that physical improvements occupy parcels differing from those appearing of record.

The Full Coverage policy provides the same protection to owners that the A.T.A. form affords lenders; in each instance the policy fee is approximately twice that of the Standard form of policy. Both the A.T.A. and Full Coverage policies lend themselves more readily to urban and subdivided land although they can, of course, be written on rural property; and, while unimproved property may be covered, they are more in demand where improvements have been made.

It must not be inferred, however, that by the simple expedient of procuring such extra-coverage, extra-premium title insurance, a broader protection against known or disclosed defects can be obtained. The coverage of matters shown by examination of the public records, matters affecting the competency or status of parties to the title, and particularly matters revealed by the inspection and survey, will be shown in any such policy. If a lessee is in possession, though no lease appears of record, his rights will be shown, not insured against, as also will be shown off-record easements, encroachments and whatever else appears to affect the title. The inspection and survey simply enable the title insurer to substitute its training and experience in ascertaining, weighing and reflecting off-record matters which constitute constructive notice to the customer against which he himself must otherwise take independent precautions.

As in the Standard policy, so in these extra-coverage policies, there are certain matters against which the title company does not insure, principally (a) defects or other matters known to the insured to exist at the date of the policy and not theretofore communicated in writing to the insurer and (b) regulations of governmental agencies respecting the occupancy or use of the land; the reasons for these exceptions being the same in either case; see D, (1) and (6), supra. While it is possible, in exceptional cases, to cover zoning ordinances, it is seldom of substantial benefit to the insured, owing to the constantly changing nature of such regulations. And the exception of matters known to the insured, not communicated to the insurer, obviously is one which is, and of right ought to be, inherent in any policy of title insurance.

G. THE INSURER

The final protection of every policy of title insurance abides in the ability, integrity, responsibility and good management of the company by which it is issued. It takes many years, many people of learning and experience and the outlay of substantial sums to build and maintain an organization which can promptly, faithfully and continuously provide the protection which the public demands and has come to expect and rely upon.

The law (see the Insurance Code of California, sections 12340, et seq.) imposes certain requirements and restrictions upon every title insurer. It

must have at least $100,000 paid-in capital; the deposit with the state treasurer of an additional $100,000 in cash or sound securities, the "guarantee fund"; a "title insurance surplus fund" equal to 10% of its annual premiums until the fund reaches 25% of its paid-in capital, and all impairments of such fund must be restored in the same way; it must have and maintain adequate "plant" facilities; it may not make loans to its officers, directors or employees; its funds must be invested in specified securities; and the declaring of dividends is restricted. It is under the supervision of the insurance commissioner and must have his yearly certificate of authority to do business, his permit to issue securities, his periodic examination of its business and affairs. These are the legal minima which all title insurers must observe.

Responsible insurers will have much more: a larger capitalization, perhaps, much larger guarantee and surplus funds, title plants of proved adequacy; personnel of ability and experience; practices of recognized soundness and reliability; management of known capacity and repute.

1. The title plant

While it is possible for an insurer to issue policies of title insurance without having a plant of its own, the work of examining and reporting the title to land cannot be done effectively, economically and quickly without an up to date and "down to date" title plant. If the insurer does not have one of its own it must rely upon another company which has such a plant for the actual work of examination and report, predicating its policies upon the work of such a company. The latter need not be a title insurance company; it may be, and often is, an "abstract" or "title" company capable of turning out its own abstracts or certificates of title. In practice, almost all of the title insurers in California are corporations maintaining plants of their own in one or more counties of the state but, in many instances, also issuing its policies covering land in other counties based upon the title work of a local abstract or title company; so that the basis of every policy is the same.

Each title plant begins with the establishment of four principal sets of books, the books of abstracts of recorded instruments, the lot books, the general indices, and the map books. These are augmented, in course of time, with books of "press copies" or "starters", representing the accumulation of office copies of every evidence of title theretofore written by the company; books of miscellaneous data sometimes called "office information", containing copies of documents or information of a special nature, such as complicated decrees, declarations of trust, property settlement agreements and other matters to which reference must be made from time to time to supplement the data found elsewhere in the plant; and books of "opinions" covering the essential facts concerning court proceedings of all kinds which, once examined, are thus made

available for subsequent occasions where the same proceedings may have a bearing, for instance: the review, after distribution, of a proceeding probating the estate of a decedent who died owning many parcels of land, the opinion showing completion of the necessary steps leading to the distribution of the estate among the heirs or devisees, and establishing the regularity of those proceedings. In the absence of such an opinion the proceedings would have to be re-examined every time another parcel of land was involved which had been included in the estate. Since it is true that every parcel of land passes through probate proceedings of some sort once in every generation, it will be seen that opinions on such proceedings alone will, in time, constitute quite a volume. A plant often will include, moreover, a complete set of tax records, gathered from all the far-flung taxing offices and agencies in the county and, because of the fact that tax descriptions ofttimes vary from record descriptions, these tax records may be completely separate from the conventional lot books.

The lot books constitute the heart of the plant. They must reflect every instrument ever recorded in the county in which the land lies which affects the particular parcel described therein. As heretofore mentioned, such instruments are, when recorded, indexed by the recorder by the names of the parties not by description of the land. These instruments are then copied into permanent books, one after another, so that the only way in which the instruments ever can be located in these books is by first ascertaining the names of the parties and scanning the indices of names. Lot books must, therefore, be prepared in which every parcel of property in separate ownership is given a separate space or column and each instrument on the records affecting that particular parcel entered in its space or column so that the title thereto can be traced from the earliest through to the latest instrument by examining that column alone.

In the compilation, as well as in the maintenance of these lot books, an abstract first is made of each recorded instrument, showing the date, and date and place of recording, the nature thereof, the parties thereto and the property affected thereby. A notation of the date and nature of each instrument is then "posted" to the respective parcels in the lot books, starting with the earliest, until each instrument in the chain of title of every parcel has been entered therein. The abstracts or "daily slips" are then bound into books labeled by date and chronologically arranged for ready reference. The abstracts of each day's recordings are posted as promptly as possible, often on the same day, and then bound up, so that the plant is always strictly up to date. When it is realized that the county recorders are themselves sometimes months behind in copying instruments into the records, the value of having the title plant always completely up to the minute may be readily appreciated.

The general index. Many of the recorded instruments, however, do not relate to or indicate any particular parcel of land. They may be powers of attorney, declarations of trust, blanket deeds (i.e., of all property of the grantor in the state or county), court decrees, affecting status, such as adjudications of bankruptcy, of divorce or incompetency, of change of name, and judgments creating liens on all property of the judgment debtor. Abstracts or daily slips of such matters obviously cannot be posted to any particular parcel of land on the lot books and so they must be noted in another set of books, alphabetically arranged, according to the names of the persons affected, known as the general index, the "G.I." as it is invariably referred to.

The map books. Every parcel of land must be identified by a "description"--a delineation thereof by established calls from which it can be identified and located on the ground. Initially, surveys were made by the government, identifying land by a legal method of subdivision; private grants were identified by name, supplemented by calls for monuments crudely or obscurely identified. In patents, in proceedings to establish private grants, and in civil actions for partition, etc., these descriptions were supplemented by maps and surveys, often crudely drawn. From these beginnings, resurveys, subdivisions, and public and private maps have been made, retraced, revised and recorded, until the accumulated data comprises, especially in the more populous counties, an imposing collection.

A title company must necessarily maintain a complete collection of official maps, but its files will not stop there. It should have available for ready reference as many of the private maps and surveys as possible, to facilitate the interpretation of the instruments in the chain of title which refer thereto. It will keep on file, also so far as necessary, copies of small maps and plats for insertion in its policies as an aid to the insured in his use thereof.

An incident of this essential part of the plant is the compilation of "arbitrary" maps by the company's engineering staff to facilitate the posting of recorded data to portions of larger holdings not identified by a separate lot number or designation. Title to a sizable plot may be vested in a person who then proceeds to deed out smaller parcels by metes and bounds descriptions. Unless each smaller parcel can be quickly identified, it would be necessary to examine every instrument affecting any part of the larger plot each time title to one of the smaller parcels is being examined. By preparing a map of the plot, sketching in each parcel as it is carved out and giving it an "arbitrary" designation (by letter or number, for instance) and then alloting each such parcel a separate column in the lot book, instruments affecting a particular parcel can be posted thereto, rather than to the plot as a whole, thus simplifying

the work of searching the title thereto.

2. The examination of title

When an order for a policy of title insurance is received it is given a number, assigned to an examiner, and delivered to a searcher. All orders for title services are numbered successively, as received, and entered in an index with a notation of the name of the examiner assigned, so that it can be located during the period of preparation. The number assigned is always important for by its number and in no other way can the "search notes" ever be located. Prompt acknowledgment of the order is sent the customer, bearing the number so assigned; and the search is immediately undertaken.

The searcher first examines the lot book, to find the space or column devoted to the particular property under search, and there notes informally the number of the order he is working on. He also checks back to ascertain the last examination and report or insurance of the title. He then notes the reference thereto and the references to every entry on the lot book relating to the parcel he is searching. From these entries he makes up the search by attaching a copy of the last report or policy written and a copy of the abstract or daily slip of each subsequent entry. From these he ascertains the names of all parties interested in the several transactions so shown and "runs" their names on the "G.I." noting each entry affecting such persons during their stay in the title, and collecting and inserting the abstracts of the instruments so shown. If these abstracts indicate the existence of court proceedings, he orders an opinion thereon and he attaches to the search the map or drawing of the parcel, if available, or orders one made. Meanwhile a tax report has been ordered from the tax division, designed to reflect the essential tax data affecting the property.

The search then goes to the examiner assigned, who, when he has the complete search, with opinions, tax data, map or plat and abstracts and starter, all arranged in proper order, proceeds to analyze the title, noting what matters shown in the starter still remain unchanged, and adding the new matter appearing of record since the date of the starter and not since disposed of; compiling his conclusions in the form of a written preliminary report which is sent to the customer.

In his analysis of the search, the examiner seldom retraces the work leading up to the writing of the starter, that is, he does not "go behind" the previous work of the company. He does, however, carefully check the parties to each instrument in the chain, the legal description of the property, the essentials of due execution and the tenor and legal sufficiency of each successive transaction. Of course, he often encounters defects somewhere along the line. Many of these he is able, by training and experience, to eliminate

or "pass" without mention. Others may be regarded as of sufficient importance to refer to a supervisor, a member of the legal staff or to the management, for disposition. Those that ultimately are considered to be so defective that they require clearing, are so shown in this report.

Many defects are technically serious and the risk that loss may eventuate requires expert evaluation. The ultimate decision is reposed in a title committee, composed of representatives of the management, including one or more lawyers, who weigh the seriousness of the defect against their experience of the likelihood of loss. In a large company many such hazards are considered daily and decisions made whether to require the defect remedied, or shown and insured by endorsement, or passed without further action. It is not the function of the company or any officer or committee to ignore material defects, or to insure the title to be different than it really is. A company which makes a practice of insuring over such defects, no matter how able it may be financially to make good its losses, will not long retain the confidence of its customers. On the other hand, a too conservative disposition in the evaluing of defects will also react adversely. A perfect title is an unknown quantity; every chain of title contains errors, omissions or departures from perfection. From most of them nothing will ever come. Others can readily be perfected. A few are really dangerous and cannot be overlooked. The function of the examiner, the supervisor, the title committee and the management of the company is essentially the same; to separate those which are a danger from those which are not; to recognize, from study and experience, the one from the other; to expedite, by passing the one while safeguarding all concerned from the possibly adverse effects of the other.

When the customer determines from the preliminary report—or after steps have been taken to clear up defects which cannot be passed—that the title is satisfactory to him, he hands the examiner such further instruments as are necessary to place title in the condition desired, with instructions to record them and issue a policy. Some time having elapsed, however, since the date of the report, it is necessary to repeat the searching process to cover the interval. If nothing appears to change the condition of title, as so reported, the instruments delivered to the examiner may then be recorded and the order completed.